88-977

No. ____

FILED
DEC 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., *et al.*,
Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO, *et al.*,
Appellees.

On Appeal from the Supreme Court of Colorado

APPENDIX TO JURISDICTIONAL STATEMENT
(Volume 1 of 2)

William H. Burchette
(Counsel of Record)
1025 Thomas Jefferson St., N.W.
Suite 700
Washington, D.C. 20007

Carol A. Curran
1010 South Cascade Ave.
Suite D
Montrose, Colorado 81401

John R. McNeill
James H. Delman
P.O. Box 1149
Montrose, Colorado 81402

Counsel for Appellants

December 14, 1988

TABLE OF CONTENTS

VOLUME 1

Opinion of Supreme Court
of Colorado - July 11, 1988 . . . . . A-1

Decision of Montrose District
Court - May 7, 1986 . . . . . A-70

VOLUME 2

PUC Decision C83-1176 - July 26, 1983 . . . . . A-93

PUC Decision C83-1392
September 7, 1983 . . . . . A-139

PUC Decision C83-1561
October 4, 1983 . . . . . A-148

Order of Supreme Court denying Petition
for Rehearing - August 15, 1988 . . . . . A-152

Notice of Appeal to Supreme Court
of United States - November 1, 1988 . . . . . A-155

Colorado-Ute's Petition for Rehearing
July 25, 1988 . . . . . A-162

Colorado-Ute Members Petition for
Rehearing - July 25, 1988 . . . . . A-175

SUPREME COURT, STATE OF COLORADO
CASE NO. 86SA244 JULY 11, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; SHELL OIL COMPANY; ATLANTIC RICHFIELD COMPANY; EXXON COMPANY, U.S.A.; CITY OF DELTA, COLORADO,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners-Appellees

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III,

Respondents-Appellants,

and

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondent-Appellee.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

EN BANC

JUDGMENT REVERSED IN PART, AFFIRMED IN PART, AND CASE REMANDED WITH DIRECTIONS

Robert T. James
Colorado Springs, Colorado

Attorney for Delta-Montrose Electric Association; Grand Valley Rural Power Lines, Inc.; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre De Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; Southeast Colorado Power Association; White River Electric Association, Inc.; Yampa Valley Electric Association, Inc.

Carol A. Curran
John R. McNeill
Montrose, Colorado

Attorneys for Colorado-Ute Electric Association, Inc.

Gorsuch, Kirgis, Campbell, Walker & Grover
William Hamilton McEwan
Joseph B. Wilson
Denver, Colorado

Attorneys for Empire Electric Association, Inc.

Miller, Schmidt & Lehr
Duane Woodard, Attorney General
Charles B. Howe, Chief Deputy Attorney General
Richard H. Forman, Solicitor General
Eugene Cavaliere, Deputy Attorney General
Denver, Colorado

Attorneys for Public Utilities Commission of the State of Colorado

JUSTICE ROVIRA delivered the Opinion of the Court.
JUSTICE ERICKSON concurs in part and dissents in part;
JUSTICE LOHR and JUSTICE VOLLACK join in the concurrence and dissent.

SUPREME COURT, STATE OF COLORADO
CASE NO. 86SA246 JULY 11, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; EMPIRE ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; HOLY CROSS ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; LA PLATA ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners-Appellees,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION; SHELL WESTERN E&P, INC.,

Respondents-Appellants,

and

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Appellants

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE; ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; SOUTHEAST COLORADO POWER ASSOCIATION,

Appellees.

Appeal from District Court, Montrose County
Honorable Richard J. Brown, Acting District Judge

EN BANC

JUDGMENT REVERSED IN PART, AFFIRMED IN PART, AND CASE REMANDED WITH DIRECTIONS

Robert T. James
Colorado Springs, Colorado

Attorney for Delta-Montrose Electric Association; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre De Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; White River Electric Association, Inc.; Yampa Valley Electric Association, Inc.

Carol A. Curran
John R. McNeill
Montrose, Colorado

Attorneys for Colorado-Ute Electric Association, Inc.

Holland & Hart
Robert M. Pomeroy, Jr.
Timothy M. Rastello
Denver, Colorado

Attorneys for Atlantic Richfield Company and Exxon Corporation

Jones, Meiklejohn, Kehl & Lyons
Edward T. Lyons, Jr.
Denver, Colorado

Attorneys for Shell Western E&P, Inc.

Miller, Schmidt & Lehr
Duane Woodard, Attorney General
Charles B. Howe, Chief Deputy Attorney General
Richard H. Forman, Solicitor General
Eugene Cavaliere, Deputy Attorney General
Denver, Colorado

Attorneys for Public Utilities Commission of the State of Colorado

JUSTICE ROVIRA delivered the Opinion of the Court.
JUSTICE ERICKSON concurs in part and dissents in part; JUSTICE LOHR and JUSTICE VOLLACK join in the concurrence and dissent.

These two cases concern a judgment of the Montrose County District Court which set aside orders promulgated by the Public Utilities Commission of Colorado (PUC or Commission) involving the design of electric power rates to be charged by Colorado-Ute Electric Association (Colo-Ute).

We reject Colo-Ute's claim that this appeal is moot. We further hold, contrary to the district court's order, that the PUC possessed statutory authority to determine whether the tariffs filed by Colo-Ute were just and reasonable. Moreover, the PUC's order that Colo-Ute's proposed all-energy rate should be replaced by a seasonally-differentiated demand-energy rate is supported by adequate findings of fact and substantial evidence. We do, however, affirm the ruling of the district court setting aside that portion of the PUC's order which allocated $24,084,126 of generation fixed costs to the energy component of the demand-energy rate design. Accordingly, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

I.

Colo-Ute generates and transmits electrical power on a wholesale basis to 14 member rural electrical cooperatives (co-ops), which in turn market the electrical power on a retail basis to electrical consumers. The co-ops are consumer owned and have representatives on the board of directors of Colo-Ute, a non-profit corporation.

In December 1981, Colo-Ute filed Advice Letter No. 45 with the PUC. The purpose of the filing was to increase Colo-Ute's wholesale electric power rates and thus increase annual revenue from the co-ops by approximately $11,120,603. At the time Advice Letter No. 45 was filed, Colo-Ute's pricing

scheme for its member co-ops was on a "flat" or "all-energy" rate basis.[1] This pricing method had been approved by the PUC in February 1981. To reach its desired revenue increase, Colo-Ute proposed increasing its all-energy rate by a uniform 12.157 percent.

A revised rate schedule became effective on January 15, 1982. As a result of a statutory provision adopted by the legislature in 1981, which is central to a resolution of the jurisdictional issue in this case, the Commission is without authority to suspend the effective date of tariff changes filed by cooperative electric associations. See § 40-6-111(4)(a), 17 C.R.S. (1984). The PUC, assuming that this statutory provision relating to suspension had no effect on its authority to investigate rate filings, on January 12, 1982, initiated Case No. 6076 for the purpose of investigating the reasonableness of the tariffs filed by Colo-Ute, and set the matter for hearing.

A number of parties intervened and participated in Case No. 6076. Intervening parties included the co-ops, as well as customers of the co-ops: Union Carbide Corporation, Shell Oil Company, Exxon Company, USA (Exxon), Atlantic Richfield Company (ARCO), and the City of Delta, Colorado. At the hearings, Colo-Ute and some of the co-ops presented evidence both in support of the revenue increase and in the continued use of a flat or all-energy rate. The PUC's staff offered evidence generally supporting a revenue increase, but recommended abandoning the continued use of the all-energy rate, which the staff asserted was not "cost tracking," and therefore, no longer appropriate for Colo-Ute.[2] In its place, the staff recommended a seasonally-differentiated demand-energy rate.[3] The intervening customers concurred in the recommendations of the Commission's staff.

The Commission approved the revenue increase sought by Colo-Ute. However, it disapproved the continued use of the all-energy rate, and ordered Colo-Ute to file "demand energy rates for its wholesale electric customers with seasonally differentiated demand charges and an annualized energy [charge] on a uniform kwh basis." Decision No. C83-1176.

Intervenors ARCO and Exxon, while in general agreement with the PUC's ultimate findings regarding the revenue increase and the substitution of the demand-energy rate, objected to that part of the PUC's decision which allocated over $24 million in generation fixed or demand costs to the energy component of the demand-energy rate design. Thereupon, ARCO, Exxon, Colo-Ute, and the co-ops filed application for rehearing, reargument, and reconsideration. In Decision No. C83-1392, the Commission denied the application of Colo-Ute and the co-ops and granted the application of ARCO and Exxon in part. Decision No. C83-1176 was modified as a result, but such modifications are not at issue.[4]

Colo-Ute and the co-ops sought judicial review in the Montrose County District Court. The appeal was assigned Case No. 83CV218. They challenged the authority of the PUC to commence an investigation concerning the rate increase on its own motion. They also claimed that the Commission's orders with respect to rate design were arbitrary, capricious, unconstitutional, an abuse of discretion, and not in accordance with the law and the evidence. Finally, they moved for a stay or suspension of the Commission's decisions, pending final determination by the district court of their challenge. This motion was granted.

ARCO and Exxon sought judicial review in the Denver District Court of that portion of the PUC's decisions which

allegedly had misclassified certain demand costs as energy costs. Given the similarities of the parties in the Denver and Montrose District Court actions, and the presence of common questions, the Denver District Court ordered the case transferred to the Montrose District Court, pursuant to C.R.C.P 98(f)(1), where it was assigned Case No. 84CV7. Subsequently, the court consolidated the two cases for hearing. The only issue in Case No. 84CV7 concerns the PUC's decision to shift substantial demand costs onto the energy portion of the demand-energy rate.

With respect to Colo-Ute's claims in Case No. 83CV218, the district court held, inter alia, that: (1) The PUC does not possess statutory authority, in the absence of a complaint, to investigate and modify the rate design of an electric cooperative association, such as Colo-Ute; (2) The PUC's orders concerning rate design amount to an unwarranted intrusion into the management prerogative and discretion of Colo-Ute; (3) The Commission's findings are conclusory in nature and are not supported by substantial evidence.[5] The district court thereupon set aside that part of Decision No. C83-1176 which required Colo-Ute to file rates and tariffs ordered by the Commission.

In Case No. 84CV7, the district court concurred in the arguments presented by ARCO and Exxon, finding that the decision of the Commission to allocate over $24 million of demand costs to energy costs was not supported by substantial evidence or adequate findings of fact, was arbitrary and capricious, and resulted in an unjust and discriminatory rate. The court set aside that portion of Decision No. C83-1176 which allocated $24 million of the demand costs to the energy costs and further held that if this court (supreme court) were to find lawful the Commission's imposition of the demand-energy

rate, the PUC would be directed to allocate demand-energy costs in accordance with the staff's cost-of-service study, as contained in Exhibit No. 84.[6]

On appeal the Commission raises the following issues: (1) Whether the Commission possesses statutory authority to institute on its own motion a proceeding to determine whether tariffs filed by Colo-Ute are just and reasonable; (2) Assuming that it possesses such authority, is the Commission's decision relating to rate design an unwarranted intrusion into the management prerogative of Colo-Ute, and do adequate findings of fact and substantial evidence exist to support its decision; and (3) Whether there is substantial evidence to support the findings that $24 million in generation fixed costs should be allocated to the energy component of the demand-energy rate.[7]

II.

Before considering the substantive issues raised in the appeals, we first address the claim of Colo-Ute, raised in its answer brief, that these appeals are moot and should therefore be dismissed.

In support of its position, Colo-Ute states that in October 1986, five months after the decision of the district court, it filed a new wholesale rate tariff governing electric power sales to the co-ops which became effective by operation of law on December 1, 1986. The tariff represented a 5-percent decrease in the all-energy rate it charged the co-ops. Colo-Ute contends that since the tariff supersedes the tariff which is the subject of Case No. 6076 and these appeals, the issues raised in the instant case are "purely academic." The PUC, ARCO, Exxon, and Shell Western E&P, Inc. argue to the contrary and urge us not to dismiss on the ground of mootness.

We have previously stated that a case is not moot where interests of a public nature are asserted under conditions that may be immediately repeated. Page v. Blunt, 126 Colo 324, 327, 248 P.2d 1074, 1075 (1952). Under our latest formulation of the mootness test, we have held that a case is not moot where the controversy is one "capable of repetition, yet evading review." Goeddecke v. State Dept. of Institutions, 198 Colo. 407, 410 n.5, 603 P.2d 123, 124 n.5 (1979) (quoting Roe v. Wade, 410 U.S. 113 (1973)); Star Journal Publishing Corp. v. County Court, 197 Colo. 234, 236, 591 P.2d 1028, 1029 (1979).

This case is not moot because the issue of proper rate design survives the most recent tariff filing. Colo-Ute's 1986 rate filing retains the same flat-energy rate structure which the Commission found objectionable, and which is at issue in the instant appeal. Colo-Ute may have changed the level of its rates with its most recent filing, but the level of rates has never been a matter of dispute. In fact, the issue which has given rise to these appeals -- the authority of the PUC to prescribe the demand-energy rate for Colo-Ute -- presents no less a controversy now than when the PUC first set Case No. 6076 for hearing. The lawfulness of the Commission's orders with respect to Colo-Ute's rate design remains a viable legal controversy. See New England Telephone & Telegraph Co. v. Public Utilities Comm'n, 329 A.2d 792, 806 (Me. 1974) (rejecting mootness argument based on new rate filing where important issues remain to be decided); Milwaukee & Suburban Transport Corp. v. Public Utilities Comm'n, 268 Wis. 573, 68 N.W.2d 552, 556, cert. denied, 350 U.S. 877 (1955) (controversy presented in review proceeding not moot where issue over method of computing depreciation of utility property remains a continuing controversy).

In addition, Colo-Ute's argument, if accepted, would operate to insulate much of its activity from judicial and/or Commission review. With the addition of section 40-6-111(4)(a), 17 C.R.S. (1984), the PUC no longer possesses the statutory authority to suspend the date on which a tariff filed by a cooperative electric association becomes effective. As a result, any new or revised tariff filed by a cooperative electric association such as Colo-Ute becomes effective by operation of law after the expiration of the 30-day notice period specified in section 40-3-104, 17 C.R.S. (1984). But it takes longer than 30 days for the Commission to review a rate tariff filed by Colo-Ute, to say nothing of the time necessary for an appeal of a Commission decision to work its way through the judicial system. If a cooperative could render an appeal moot merely by filing a new tariff while an appeal is pending, the Commission's authority to regulate cooperative utilities would be undermined.

Moreover, ARCO, Exxon, and Shell Western E&P, Inc. seek an order from this court directing Colo-Ute to pay refunds to customers who might have over paid under the all-energy rate scheme. Refund amounts would be based on the difference in payments made under the all-energy and demand-energy rates.

If ARCO, Exxon, and SWEPI are entitled to refunds, an issue we do not decide, this would preclude dismissing the instant case on mootness grounds. It is generally the law that claims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable. Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction Second § 3533.3 at 262 (1984). Other courts have rejected mootness claims in analogous circumstances, where, addressing the customer's complaint regarding damages, they first require

a resolution of other issues on their merits. See, e.g., Memphis Light, Gas & Water Div. v. Kraft, 436 U.S. 1, 7-8 (1978) (although injunctive relief from utility's termination of service had been mooted, customer's claim for damages saved case challenging termination procedures from the bar of mootness); Meyers v. Jay Street Connecting Railroad, 288 F.2d 356, 358 (2d Cir.), cert. denied, 368 U.S. 828 (1961).

Finally, Colo-Ute cites in support of its position Air Pollution Control Comm'n v. Colorado-Ute Electric Ass'n, 672 P.2d 993 (Colo. 1983). In that case, Colo-Ute challenged the validity of an air pollution control commission regulation setting forth conduct necessary to obtain an emission permit. Although Colo-Ute cites the case for the proposition that "when the issues in a case have been changed by subsequent events, this court has not hesitated to find that the case has been mooted," Colo-Ute has glossed over the particular facts in that case. We held in Air Pollution Control Comm'n that the question of whether the regulation had been validly adopted was moot, because the regulation had subsequently been repealed. 672 P.2d at 997. By comparison, Colo-Ute's all-energy rate is still in use and thus an issue which gave rise to the present controversy remains unresolved.

Having determined that Colo-Ute's mootness claim is without merit, we now address the substantive issues raised by this appeal.

III.

In holding that the PUC lacked jurisdiction to investigate Colo-Ute's rate filing, the district court focused upon a provision of the public utilities law which provides, in part: "Upon complaint filed by any member or customer of a

cooperative electric association or by any affected public utility, the commission shall determine whether the rate, charge, rule, or regulation in question is contrary to this section, section 40-3-106(1), or section 40-3-111." § 40-6-111(4)(a), 17 C.R.S. (1984).[8] Although the court made reference to a number of other provisions in the public utilities law granting the Commission the authority to investigate rates either upon the filing of a complaint or upon its own motion, it concluded that section 40-6-111(4)(a):

> [P]ermits that authority only upon the filing of a complaint by any member or customer of a cooperative electric association or by any affected public utility. Subparagraph (4)(a) removes the power of the PUC to suspend rates, fares, tolls, rentals, charges, classifications, practices, rules or regulations pending a hearing, and does not provide that the PUC, of its own motion, may hold such hearings.

Although other statutory provisions concern public utilities in general, the court stated that section 40-6-111(4)(a) is a "specific statutory provision relating to cooperative electric associations, and must be followed." The district court relied on a maxim of statutory construction that "where specific and general statutes conflict, the provisions of the specific statute prevail." In other words, section 40-6-111(4)(a) trumps all other provisions in the public utilities law which give the PUC the authority to investigate rates upon the filing of a complaint, or upon its own motion. The court concluded that the PUC does not have the authority pursuant to section 40-6-111(4), without complaint, to change the rate design of an electric cooperative such as Colo-Ute.

We have stated on numerous occasions that where a statute is capable of more than one interpretation, it must be construed in light of the apparent legislative intent and purpose. Among the guidelines to be considered are the ends the statute was designed to accomplish, and the consequences which would flow from an alternative construction. If separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, we should adopt that construction which results in harmony rather than that which produces inconsistency. Mooney v. Kuiper, 194 Colo. 477, 479, 573 P.2d 538, 539 (1978); Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 283, 552 P.2d 300, 303 (1976). Two statutes concerning the same subject matter are to be read together to the extent possible so as to give effect to legislative intent. Peoples Natural Gas Div. v. Public Utilities Comm'n, 698 P.2d 255, 263 (Colo. 1985). Further, we will presume that the legislature intended a just and reasonable result when it enacted a statute. Allen v. Charnes, 674 P.2d 378, 381 (Colo. 1984). See also § 2-4-201(1)(b), 1B C.R.S. (1980) ("the entire statute is intended to be effective").

The maxim of statutory construction relied upon by the district court is, however, wholly irrelevant where the specific statute itself -- section 40-6-111 -- expressly vests the PUC with authority to investigate rates, and therefore, raises no conflict with other provisions of the public utilities law. If the district court had applied proper principles of statutory construction, it would not have ignored the remainder of section 40-6-111, particularly subsection (1), and other pertinent provisions of the public utilities law, all of which confirm the Commission's power and duty to investigate tariff changes involving utilities such as Colo-Ute. The district court should have read section 40-6-111(4)(a), 17 C.R.S. (1984), together

with other relevant statutory provisions, including sections 40-6-111(1), 40-6-108(1)(b), and 40-3-102, 17 C.R.S. (1984), in light of the apparent legislative intent and purpose.

The General Assembly added subsection (4) to section 40-6-111 in 1981. See "An Act Concerning the Public Utilities Commission," ch. 482, sec. 2, § 40-6-111(4), 1981 Colo. Sess. Laws 1922-1923 [codified at § 40-6-111(4)(a), 17 C.R.S. (1981 Supp.)]. The effect of the 1981 amendment was to grant to cooperative electric associations relief from the PUC's power to suspend rates for up to 120 days pending investigation and hearing, see § 40-6-111(1)(b), without diminishing the PUC's power under existing statutes to investigate and hold hearings, whether upon complaint or on its own motion, and to enter remedial orders to carry out the purposes of the public utilities law.

As a result of the 1981 amendment, when a cooperative electric association files a tariff with the PUC, such a tariff becomes effective at the expiration of the 30-day notice period provided by section 40-3-104, 17 C.R.S. (1984). Therefore, any hearing commenced by the PUC, whether on its own motion, or upon complaint made to the PUC, pursuant to sections 40-6-101(1) or 40-6-111, does not have the effect of suspending the effective date of such tariffs. This is not the case, however, with respect to other utilities in Colorado subject to the PUC's jurisdiction. With respect to those utilities, the PUC still retains the power to suspend the effective date of such tariffs. See § 40-6-111(1)(a), (b).[9]

It was the statutory suspension power -- not the PUC's power to investigate and hold hearings -- which was abolished by section 40-6-111(4)(a) for the benefit of cooperative electric associations. These organizations had contended that the

"regulatory lag" which accompanied the investigation and hearing process made it difficult for them, because of the intervening suspension period, to be adequately compensated for the costs of inflation even if the proposed rate increase was ultimately approved in full. See Colorado-Ute Electric Ass'n v. Public Utilities Comm'n, 198 Colo., 534, 544, 602 P.2d 861, 867 (1979). The efforts of cooperative electric associations to persuade the General Assembly to grant some form of relief achieved fruition with the passage of section 40-6-111(4)(a) in 1981. See also Advice Letter No. 45 ("Under the provisions of [section 40-6-111(4)(a)], this rate filing becomes effective on thirty (30) days notice -- thereby eliminating any regulatory lag in obtaining necessary rate relief."). The statute only eases the burden on cooperative electric associations resulting from suspensions during the hearing process. It does not exempt cooperative electric associations from PUC review of tariff changes.

The court below wrongly concluded that by removing the suspension power, the legislature also intended to limit the Commission's powers to investigate tariff changes, hold hearings, and enter remedial orders. We have previously rejected the assumption that the power to investigate and hold hearings is inseparably tied to, and dependent upon, the suspension power, such that removing the power to suspend also precludes an investigation. See, e.g., Public Service Co. v. Public Utilities Comm'n, 653 P.2d 1117, 1122 (Colo. 1982) ("we decline to impose an 'all or nothing' requirement upon the commission"). Moreover, section 40-6-111(2)(a), 17 C.R.S. (1984), states that tariff changes "not so suspended" shall go into effect after the 30-day notice period "subject to the power of the commission, after a hearing on its own motion or upon complaint, as provided in this article, to alter or modify the same."[10] Traditionally, the PUC has enjoyed broad discretion in

determining whether to suspend the effective date of newly filed rates, while under investigation, or allow rates to become effective (after the statutory notice period), fully or in part, pending the outcome of an investigation.

In enacting section 40-6-111(4)(a), the General Assembly was careful to structure the amendment in such a fashion as to make the suspension powers inapplicable to cooperative electric associations, while leaving such entities subject to the other provisions of that section and the public utilities law. The statute expressly provides that "this subsection (4) shall not be construed to exempt such associations from any other provision of this section." Among those "other provisions of this section:" section 40-6-111(1), which grants the Commission the power to have a hearing concerning the propriety of a newly filed rate or changed rate, "either upon complaint or upon its own initiative . . ."; and section 40-6-111(2)(a). When the statute is read in this way -- that cooperative electric associations are exempted only from that provision relating to the PUC's power of suspension -- an interpretation is achieved which gives a harmonious and consistent effect to its various provisions.

In fact, when the last sentence of section 40-6-111(4)(a) is read in conjunction with section 40-6-108(1)(a) and (b) and section 40-6-111(1), it becomes possible to discern that not only are these provisions consistent with each other, but also that the last sentence of section 40-6-111(4)(a) lessens a requirement in section 40-6-108(1)(b) -- thereby promoting the legislative intent behind subsection (4) of easing the regulatory burden on cooperative electric associations.

Section 40-6-108(1)(b) prohibits the PUC from entertaining complaints as to the reasonableness of any rates or charges of

any public utility "except upon its own motion," or upon a complaint signed by:

> The mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the county, city and county, city, or town, if any, within which the alleged violation occurred, or not less than twenty-five customers or prospective customers of such public utility.

On the other hand, section 40-6-111(4)(a) authorizes the PUC to determine whether a rate charged is discriminatory or preferential "[u]pon complaint filed by any member or customer of a cooperative electric association or by any affected public utility . . ."

In a sense, the complaint provision incorporated in section 40-6-111(4)(a) is a counterweight to the freedom given cooperative electric associations to increase their rates without suspension. Although the legislature, by adding section 40-6-111(4)(a), terminated the authority of the PUC to suspend the effective date of a tariff filed by an electric cooperative, the members or customers of a cooperative electric association or affected public utility were given added protection in the form of an eased requirement for challenging the utility's rate increases.

The last sentence of subsection (4) states that "[u]pon complaint . . . the commission shall determine. . . ." § 40-6-111(4)(a) (emphasis added). In other words, under certain circumstances the Commission is required to investigate a tariff change. But nothing in subsection (4) can be interpreted as diminishing any of the Commission's powers under existing

law to investigate tariff changes and, if necessary, to prescribe just and reasonable rates.[11]

Having concluded that the PUC was properly acting within the scope of its authority, we now consider whether that authority was exercised in a lawful manner.

IV.

The district court found "that the Commission's action in changing Colorado-Ute's rate design from a flat-energy rate to a seasonally adjusted demand-energy rate is an unwarranted intrusion into the management prerogatives and discretion of Colorado-Ute." Among the reasons given by the court were that in 1981 the PUC approved a flat-energy rate for Colo-Ute and no findings in Decision No. C83-1176 vitiated the 1981 order, and in the absence of evidence or findings of abuse associated with Colo-Ute's existing all-energy scheme, "the Court can only conclude that the Commission is substituting its own personal preference in managerial matters and has exceeded its statutory authority."

The adequacy of the Commission's findings will be discussed later in this opinion. Considering solely the issue of managerial discretion, it is clear that the district court erred in concluding that the Commission, in prescribing the proper rate design for Colo-Ute, overstepped the bounds of its proper authority. The setting of "just and reasonable rates," both as to level and design, goes to the very essence of the Commission's duties under the public utilities law. See § 40-3-102, 17 C.R.S. (1984). It is precisely the Commission's raison d' etre to determine and prescribe just, reasonable, non-discriminatory, and non-preferential "rates of every public utility in this state." Both statutory and case law demonstrate that rate-making, both

as to charge and design, is a vital part of the Commission's area of responsibility.

Rate-making is a legislative function. Mountain States Telephone & Telegraph v. Public Utilities Comm'n, 176 Colo. 457, 464, 491 P.2d 582, 586 (1971). Under the Colorado Constitution, art. XXV, the legislative authority in public utility matters has been delegated to the PUC. Mountain States Telephone & Telegraph v. Public Utilities Comm'n, 195 Colo. 130, 134, 576 P.2d 544, 547 (1978). As such, the PUC, in the area of utility regulation, including rate-making, has broadly based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it. Id.; Miller Bros. v. Public Utilities Comm'n, 185 Colo. 414, 431, 525 P.2d 443, 451 (1974).

Nowhere in title 40, C.R.S., has the legislature specifically restricted the authority of the PUC in designing rates for cooperative electric associations. To the contrary, the public utilities law imposes upon the PUC no more imperative duty than to "adopt all necessary rates . . . and regulate all rates . . . of every public utility of this state." § 40-3-102. No exception is provided for cooperative electric associations. Until the General Assembly changes the law, the Commission possesses not only the power and authority, but also the duty to prescribe the rates of all utilities subject to its jurisdiction. The fact that the instant case involves rate design, as opposed to rate increase, is irrelevant for purposes of the analysis. After all, rate design, just as much as rate levels, could produce unjust, unreasonable, discriminatory, or preferential results.[12]

The district court held that the Commission can set aside a rate only where "there is a substantial showing that rate payers

are prejudiced materially . . ." and that "the rate is so unreasonable as to be detrimental to the public interest . . ."; in all other circumstances, rate design "[is] within the realm of sound management discretion of the public utility."

It is of course generally accepted that the management of the utility belongs to the company. Public Service Co. v. Public Utilities Comm'n, 653 P.2d 1117, 1123 (Colo. 1982). The PUC may not, under the guise of rate regulation, take over the management of the company. As to matters specifically entrusted to management, the PUC may not assert itself absent an abuse of managerial discretion. Id. But it has never been the law in Colorado that rate-making is solely a matter within the domain of management, such that PUC involvement is triggered only following an abuse of that discretion. Rate-making, including the designing of rates, has long been the exclusive province of the Commission. In fact, in a previous case where this court recognized that "[c]ourts and Commission should . . . in general, not succumb to the temptation of assuming the role of management," we went on to hold that "our regulatory commissions have a duty to declare the abuse and make such orders as will give to ratepayers the advantage of those economies in which management has failed to avail itself." Colorado Municipal League v. Public Utilities Comm'n, 172 Colo. 188, 203-04, 473 P.2d 960, 967 (1970).

The district court erred when it concluded that the Commission's action in ordering Colo-Ute to shift to a demand-energy rate "is an unwarranted intrusion into the management prerogatives and discretion of Colorado-Ute."[13]

We now turn to issues concerning the adequacy of the Commission's findings, and the sufficiency of the evidence to support the findings.

V.

A.

Adequacy of Commission Findings

The district court held that the "whole tenor of Decision No. C83-1176 as it relates to rate design is one of personal preference on the part of the Commission as opposed to specific findings of fact which would support a new rate design." In the court's words:

> The commission has made no such findings in any of its decisions regarding Case No. 6076, and a review of the record indicates that no such findings can reasonably be made. The bootstrap attempt to do so in Decision No. C83-1392 makes no additional findings than those contained in the original Decision No. C83-1176. Nothing in the record supports the bold faced conclusion stated by the commission on page 3 in Decision No. C83-1392 that the flat energy rate currently charged by Colorado-Ute is discriminatory, preferential, creates an advantage, or otherwise violates 40-3-106(1) or 40-3-111.

Any ultimate findings the district court was able to discern in the PUC's decisions, whether implied or stated, were critiqued

as "conclusive [sic] in nature and . . . not supported by any factual findings based on the record."

The standard for judicial review of the Commission's decisions is governed by section 40-6-115(3), 17 C.R.S. (1984), which provides:

> (3) Upon review, the district court shall enter judgment either affirming, setting aside, or modifying the decision of the commission. So far as necessary to the decision and where presented, the district court shall decide all relevant questions of law and interpret all relevant constitutional and statutory provisions. The review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the decision under review violates any right of the petitioner under the Constitution of the United States or the State of Colorado, and whether the decision of the Commission is just and reasonable and whether its conclusions are in accordance with the evidence.

We have held that this statutory provision limits the court's review of PUC decisions to a determination of whether the PUC has regularly pursued its authority, whether its conclusions are supported by findings of fact based upon adequate evidence, and whether the Commission has reached its decisions by applying the appropriate constitutional and legislative standards. Ram Broadcasting of Colorado, Inc. v. Public Utilities Comm'n, 702 P.2d 746, 750 (Colo. 1985);

Public Utilities Comm'n v. Northwest Water Corp., 168 Colo. 154, 169, 451 P.2d 266, 273-74 (1969).

We have long held that the factual determinations of an administrative body such as the PUC are entitled to considerable deference. G&G Trucking Co. v. Public Utilities Comm'n, 745 P.2d 211, 216 (Colo. 1987). After all, a reviewing court, since it is without the assistance of a staff, and the expertise of the Commission, should not undertake to duplicate the evaluation and judgment processes followed by the PUC in arriving at its decision. Morey v. Public Utilities Comm'n, 629 P.2d 1061, 1068 (Colo. 1981); Atchinson, Topeka & Santa Fe Railroad Co. v. Public Utilities Comm'n, 194 Colo. 263, 267, 572 P.2d 138, 141 (1977). It is peculiarly within the province of the PUC to decide what weight should be accorded the evidence and to choose among conflicting inferences that may reasonably be drawn from that evidence. G&G Trucking, 745 P.2d at 216; Acme Delivery Service v. Cargo Freight System, 704 P.2d 839, 843 (Colo. 1985). When two equally reasonable courses of action are open to the Commission, the reviewing court should not substitute its judgment for that of the Commission in selecting the appropriate alternative. City of Montrose v. Public Utilities Comm'n, 629 P.2d 619, 623 (Colo. 1981). A reviewing court's function is limited to determining whether substantial evidence exists in the record to support the PUC's determinations. If not, the Commission's order must be set aside. If so, the judicial inquiry is at an end, for the reviewing court is not permitted to substitute its judgment for that of the Commission. G&G Trucking, 745 P.2d at 216.

Findings by the Commission need not be presented in any particular form, and a necessary finding may be implied from other findings made. Caldwell v. Public Utilities Comm'n, 200

Colo. 134, 138, 613 P.2d 328, 332 (1980); Aspen Airways, Inc. v. Public Utilities Comm'n, 169 Colo. 56, 62, 453 P.2d 789, 792 (1969). Where the Commission purports to make such findings, they must be discernible to the reviewing court. Caldwell, 200 Colo. at 138, 613 P.2d at 332. Further, findings of fact by the Commission must show which evidence it accepts as competent and worthy of belief, and that which it rejects. Id.; Aspen Airways, 169 Colo. at 62, 453 P.2d at 792. Based upon these standards we are satisfied that the Commission's conclusions are supported by adequate findings of fact.

Examination of Decision Nos. C83-1176 and C83-1392 reveals that the Commission's findings are adequate to support its ultimate conclusion that the all-energy rate is no longer appropriate for Colo-Ute and should be replaced in favor of the demand-energy rate. It found, based upon the evidence presented, that Colo-Ute's member distribution cooperatives exhibit a high coincidence of peak demand with the Colo-Ute system peak demand;[14] that Colo-Ute's "total cost per unit of output has varied monthly," contrary to Colo-Ute's position that the all-energy rate and its resource management plan have resulted in a uniform cost per unit of output on a monthly basis; and that the Colo-Ute system is characterized by a "definite surplus of base load capacity at certain times which indicates that Colo-Ute has not achieved uniform loading of capacity throughout the day. This condition results in an uneconomic under-utilization of capacity."

With respect to Colo-Ute's resource management plan, the PUC found that it was not effective in that it contributed to growth in peak demands. Further, Colo-Ute's load curve is not flat; Colo-Ute has not been able to make non-member sales to fill in the valleys of its load; its load factor has deteriorated in

recent years; and given likely economic prospects in the near and long-term, it is not expected that Colo-Ute will be better able "to sell energy to non-members so as to use its plants more efficiently." Also, significantly increased expenses associated with Colo-Ute's purchase of power from other utilities to meet peak demand, and the fact that Colo-Ute is "unable to meet its valleys on its system, indicate that its resource management plan and associated flat-energy rate are not working to the benefit of its ratepayers." The PUC then found that since Colo-Ute's total cost of generating a kilowatt hour is not uniform over time "it follows that a flat or uniform energy rate is not cost tracking," and the all-energy rate provides a distorted price signal to member systems.

In support of its adoption of the demand-energy rate, the PUC found that a demand-energy rate is appropriate for a utility whose members exhibit a high coincidence of peak demand with the system peak; that as much as two-thirds of Colo-Ute's costs are capital related; that the demand-energy rate, premised as it is upon the separate and distinct recognition of the two major cost components of producing electricity, capital and fuel, provides a more accurate price signal than the all-energy rate, and more directly tracks costs than an all-energy rate, as it "assigns costs more directly to the cost causer"; that the wholesale customers of Colo-Ute are capable of comprehending a demand and energy rate with a fixed customer charge; and that the demand-energy rate is the most cost tracking rate for the wholesale power charges of Colo-Ute.

One of the fundamental principles of electric power rate design is that rates charged should accurately reflect the utility's actual cost of providing service, including both capital costs and operating expenses. We have held that the "PUC

must therefore set rates which protect both: (1) the right of a public utility company and its investors to earn a rate of return reasonably sufficient to maintain the utility's financial integrity; and (2) the right of consumers to pay a rate which accurately reflects the cost of service rendered." Public Service Co. v. Public Utilities Comm'n, 644 P. 2d 933, 939 (Colo. 1982).

Here, inasmuch as the Commission has made specific findings establishing that the all-energy rate currently in place is less able to track the cost of service than a demand-energy rate, the Commission has complied with the statutory requirement of determining whether the rate charged is violative of sections 40-3-106(1) or 40-3-111.[15]

The court below erred when it concluded that "these findings . . . are conclusive [sic] in nature and are not supported by any factual findings based on the record." To the contrary, the Commission's findings, whether explicitly stated or implied, comply with statutory requirements that findings be made. Moreover, these findings are adequate to support the Commission's ultimate conclusions regarding Colo-Ute's rate design.

B.

Substantial Evidence

The district court held that "[t]he record does not support the conclusions reached by the PUC as to the applicability of the demand-energy rate to the Colorado-Ute system." Further, "[i]n short, there does not appear to be sufficient competent evidence for the Commission to conclude that either the demand-energy rate is most appropriate for Colorado-Ute because of the high degree of coincidence of peaks, nor [sic]

that the demand-energy rate is the most cost tracking rate available for Colorado-Ute."

The standard of substantial evidence requires more than merely "some evidence in some particulars" to support the Commission's decision. Home Builders Ass'n of Metropolitan Denver v. Public Utilities Comm'n, 720 P.2d 552, 562 (Colo. 1986); Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304, 1308 (Colo. 1986). Review of the record satisfies us that there is substantial evidence to support the Commission's ultimate conclusions that (1) the demand-energy rate is the most cost tracking rate for the wholesale power charges; and (2) "Colorado-Ute [should] file demand-energy rates for its wholesale electric customers with seasonally differentiated demand charges and an annualized energy on a uniform kilowatt basis as hereinafter ordered." Without discussing all of the evidence in detail, we will refer to the most significant presentations put before the Commission.

The Commission heard testimony from Dr. William Loehr, professor of economics and expert in the area of rate design. Loehr testified that "rates should track costs as closely as possible." Further, to properly reflect costs, "rates should be based theoretically upon marginal costs," i.e., the social costs of increasing or decreasing the supply of that commodity. Since the calculation of marginal costs for utilities is difficult, however, Loehr testified that "[t]he direct application [to utilities] of marginal cost pricing is often not practical."

Rates based upon separate charges for demand and energy costs, or demand-energy rates, recognize that there are two major components to the cost of producing energy: (1) fixed capital expenses associated with the generation and transmission of electricity (demand costs); and (2) variable operating and

maintenance expenses consisting primarily of fuel costs (energy costs). In Colorado, utilities, particularly Colo-Ute, predominantly use coal-fired plants. Therefore, fuel costs represent the cost of coal, which is low in comparison with oil or gas. Capital costs, however, tend to be relatively high, since it is more costly to build coal-fired facilities than oil or gas-fired ones. All utilities face trade-offs among costs. Loehr testified that "the trick for utilities is, over the long run, to choose that combination of capital . . . and fuel costs which together imply minimum total cost."

An exhibit sponsored by the president of Colo-Ute, for example, revealed that "[of] the total costs that must be recovered by [Colo-Ute], approximately two-thirds are associated with the cost of capital and one-third with the cost of fuel and purchase power." In effect, Colo-Ute has "incurred the high capital cost of coal-fired generation units to take advantage of low fuel costs."

The Commission staff's cost-of-service study, which was uncontroverted, and which was the only cost-of-service study offered, also demonstrates that Colo-Ute incurs these two types of costs, demand and energy, in supplying electricity. The cost-of-service study also indicates that approximately 56 percent of Colo-Ute's costs are fixed capital (demand) costs, and the remaining 44 percent are fuel and similar variable (energy) costs.

Loehr testified that since capital is the predominant element in Colo-Ute's costs, it should be reflected in Colo-Ute's rates. For this reason, a demand charge should be a part of Colo-Ute's rate structure. This demand charge would be designed to "track," or recover, that proportion of total cost representing capital cost. Accordingly, Colo-Ute's rates must include both

demand charges, to recover fixed capital costs, and energy charges, to recover the cost of fuel and other variable expenses. Further, it was Loehr's position that these two costs should be segregated, and billed separately to each customer. If not, the utility's customers receive a distorted price signal, and do not pay a rate that tracks the actual cost of providing electric service.

The rationale behind the demand charge, as explained by Loehr, is that through such a charge, Colo-Ute's customers, i.e., member systems, can be charged directly for their share of the use of the Colo-Ute system's facilities. "[A]s the system grows, members must choose whether or not to place increasing demands upon that system. Increased demands on the system imply additional commitments of capital resources. [Colo-Ute] members should face a rate structure which reflects the cost of the capital resources that they will force [the Colo-Ute system] to incur should they choose to increase demand."

Other witnesses, including Warren L. Wendling, a public utilities engineering analyst, offered testimony in which they recommended that Colo-Ute adopt a seasonally-differentiated demand-energy rate. Among the advantages cited were: (1) Demand-energy rates provide an incentive to customers to adjust their consumption pattern so that the total costs to them are lowest and marginal costs of the system are lowest; (2) the system would be deferring capital investments in generation and transmission plants; and (3) other benefits lie in reduced capacity purchases on peak or for reserve requirements, and in reduced operation and maintenance costs.

Moreover, the witnesses testified that any demand charges should be seasonally differentiated, since the Colo-Ute system peaks in the winter time, not in the summer time. The staff's

analysis based on an adjusted total cost-of-service shows a significant disparity between the system's summer and winter season costs (the summer figure is 34.545 mills per kwh; the winter figure is 42.625 mills per kwh). Growth in peak demand in winter is the type of growth which causes the system to incur additional capital expenditures. "A higher demand charge in winter than in summer should be used to signal [Colo-Ute] members that their winter peak consumption places constraints upon the capacity of the system."[16]

When asked their opinions of the all-energy rate as proposed by Colo-Ute, the rate design specialists attacked such a scheme as failing to track costs, and therefore, failing to properly reflect the costs of service. In Lochr's words:

> I do not believe the flat energy rate to be based upon sound principles and therefore I cannot recommend it. The flat energy rate is constructed as if the only cost of generating and supplying electricity were fuel costs. Since fuel costs are only a small part of total costs, a flat energy rate conveys a distorted price signal. As I mentioned before, the main costs are the costs of capital. A flat energy charge conveys a signal to the members and their ultimate customers to conserve energy. It conveys no signal related to how they conserve energy. If energy conservation occurs during off peak periods, but energy use remains high during peak periods, the system will still have to incur the costs of capacity to provide power on peak, yet use that capacity less during off peak periods. The result of this would be that capacity costs would have to be spread over

> fewer kwh and the average price per kwh would have to rise.

Wendling, when asked whether Colo-Ute's flat-energy rate is a "just and reasonable rate," responded that the flat-energy rate "does not reflect how a utility is planned, constructed nor operated. The rate does not track costs to cost causers. Therefore the rate is not just."

The record indicates additional evidence regarding the Colo-Ute system's load factor and coincidence of member peak demands with system peak demands, both of which underscore the failings of Colo-Ute's all-energy rate structure, and the beneficial results which would accompany the introduction of the demand-energy rate structure.

Colo-Ute witness Krumins contended that "the combination of a flat energy rate and Colorado-Ute's resource management plan have resulted in a uniform cost per output on a monthly basis, the operation of generation units at full capacity and a flat load curve." In fact, an exhibit sponsored by Krumins, "makes it clear that during the test year total costs varied from 3¢/kwh in January to 4.3¢/kwh in October, a 1.3¢/kwh difference (or 43 percent); by 1982, the total cost varied from 3¢/kwh in January to 4.5¢/kwh in June, a difference of 1.5¢/kwh (or 50 percent)." On the basis of these figures, the Commission concluded "from Colo-Ute's own evidence that the total cost per unit of output has varied monthly." Further, since Colo-Ute's total costs of generating a kwh are not uniform over time, "it follows that a flat [or all] energy rate is not cost tracking."

Finally, the Commission heard testimony regarding the coincidence of peak demands within the Colo-Ute system.

After noting that "[t]he commission relied heavily upon Exhibit 94 in an attempt to show a high coincidence between the system's peaks and the members' peaks," the court below remarked that "that exhibit does not appear to accurately track all of the data available to determine coincidence of peaks." Further, the exhibit "shows that the peaks are not nearly as coincident as believed by the commission." The Commission's findings on this issue, however, are also supported by substantial evidence.

Among other pieces of information, Exhibit 94 documents the dates, times, and monthly peak demands for Colo-Ute and its co-op members during the period from November 1980 through October 1981. Working with this data, Mitchell, a staff witness, testified that during February 1981, which is the highest peak load month of Colo-Ute's system during the test year, 8 of the 10 members documented peaked during the top 5 percent of peak hours of the entire Colo-Ute system. The exhibit further demonstrates that in February 1981, the 14-member coincidence peak as a percentage of the maximum demand for the system as a whole was 96.18 percent, and, in fact, for the entire test year, in only two months did this figure drop below 90 percent. Moreover, for all months of the test year the Colo-Ute members had individual peaks which were highly coincident with the Colo-Ute system peak. Further, another exhibit submitted by Colo-Ute, and which indicates that 9 of the 14 members exhibited a coincidence in excess of 90 percent, similarly demonstrates the high coincidence of member demands with the system peak.

The significance of all this for rate design is that the Commission heard testimony that "[i]n cases where peak demands tend to be highly coincident, a demand-energy rate is appropriate."

This evidence regarding peak demands is more than sufficient to support the Commission's findings on this issue. In ignoring or casting aside Exhibit 94, the court below exceeded the proper standard of judicial review.

The evidence put forth by Colo-Ute and the Commission staff to support or challenge the propriety of the all-energy rate design was in dispute. Given the conflicting nature of the evidence, alternate conclusions could have been reached. All this establishes is that the Commission performed its duty by resolving these disputed issues of fact in favor of the demand-energy rate. The court may have disagreed with these findings on disputed questions of fact, but it is not within the province of the district court to substitute its judgment for that of the PUC on disputed questions of fact. Answerphone, Inc. v. Public Utilities Comm'n, 185 Colo. 175, 178, 522 P.2d 1229, 1230 (1974).

Substantial evidence supports the Commission's adoption of the seasonally-differentiated demand-energy rate. The district court's rejection of the Commission's findings constitutes an impermissible intrusion into the PUC's rate-making process. Accordingly, the order of the district court in Case No. 83CV218 is reversed.

VI.

Finally, we consider the issue raised in Case No. 84CV7. In that case, two customers of the co-ops, ARCO and Exxon (ARCO/Exxon), sought review of that portion of the Commission's decision which allocated over $24 million of generation fixed costs (demand costs) to the energy component of the demand-energy rate.

The evidentiary basis for the allocation was provided by Wendling who testified that electric utilities, in an effort to operate in the most economical manner, construct a mixture of base-load, intermediate, and peaking power plants. Base-load plants (usually either coal or nuclear) are designed to run 24 hours a day and are characterized by high capital costs and low operating costs, whereas peaking plants (usually oil-fired or gas-fired) are designed to be operated for short periods of time, and are characterized by low capital costs, but high operating costs.

Wendling was of the opinion that with respect to generating costs only, there should be a recognition of a utility's greater investment in a generating plant able to burn coal:

> A utility can minimize its investment in a generation plant by constructing oil or gas fired generators. However, a fuel cost penalty is increased. On the other hand a utility may expend more capital and build a coal fired unit and burn a lower price fuel. Therefore, this additional investment should be recovered in the energy charge.

He testified that one method used by utilities to address capacity problems resulting from a utility's greater investment in higher capital cost generation is the adoption of a time-of-day rate, which recognizes the use of capacity at the time it occurs.[17] He noted that a number of obstacles stood in the way of Colo-Ute's adoption of a time-of-day rate, including the increased complexity of metering and billing, and the need to perform cost allocation studies for the distribution cooperatives. Wendling conceded that the PUC staff had failed to request the

data necessary to formulate or propose such a rate for Colorado-Ute.

As a surrogate for this time-of-day rate which he believed appropriate for the Colo-Ute system, and to compensate for the recognized insufficiencies regarding time-of-day rate data, Wendling proposed a modification of the basic demand-energy rate. This surrogate would be created by shifting to the energy component of the demand-energy rate $24,084,126 of demand costs representing the "average" portion of the "average and excess demand (AED)" allocation.[18]

Wendling testified that since the average demand component of the AED allocation is analogous to the base-load portion of generating capacity -- the costs of which are recovered through the energy charge under time-of-day rates -- the average demand component should, therefore, be recovered in the energy charge. As the Commission described this modification: "Mr. Wendling testified that for the Colorado-Ute system, the amount so calculated approximated very closely the dollars of base-load generation that would have been spread to all hours by a time of use rate." For Colo-Ute this average demand component, i.e., the $24 million in demand-related costs, is a surrogate for the cost of base-load generation.

In effect, the allocation of $24 million in generated fixed (capital) costs to be recovered under the variable (operating) costs is a recognition of the fact that Colo-Ute, because it had constructed only coal-fired base-load plants, was using such plants to meet its peak, and therefore, was substituting capital costs for operating costs in its operations. As a result of this allocation, member cooperatives would be charged the same

rates as if Colo-Ute had originally constructed the "correct" mixture of plants.

Relying exclusively on the time-of-day surrogate approach, the Commission concluded that the revenue requirement associated with base-load generation should be transferred to the energy charge, and only the excess portion of the AED allocation should be collected in the demand charge. The Commission determined that placing only the excess portion of the AED allocation in the demand charge would provide an automatic incentive for Colo-Ute to improve its system load factor, since: "The higher the load factor becomes, the higher is the proportion of generation costs collected in the energy charge and the lower is the demand charge. This provides the incentive to maintain and improve the system load factor that was absent in the flat energy rate."

Because the court found that "there was no technical literature to support this classification and that the witness had conducted no research or studies which would support this misclassification," it concluded that the Commission's decision was not supported by substantial evidence and was arbitrary and capricious.

Next, the district court concluded that the Commission failed to make adequate findings of fact to support its classification of certain demand costs as energy costs. "[T]here was no finding nor evidence which suggested how the shift of the [$24 million] corresponded to the premise," i.e., Colo-Ute's needing a greater investment of capital than that generally needed for oil or gas plants.

Finally, the court held that the PUC rate is discriminatory and establishes a preference because it requires a high-load

customer to subsidize a low-load customer, and summer users to subsidize winter users. It reasoned that the shift of demand cost to energy cost, which is contrary to the Commission's own cost-of-service study, results in an unjust and discriminatory rate in violation of section 40-3-106.

The district court set aside that portion of the Commission's order which allocated over $24 million in demand cost to energy cost. Further, the court ruled that if the supreme court were to set aside the district court's order in No. 83CV218, and, in effect, uphold the Commission's adoption of the demand-energy rate design, then the Commission would be directed to adopt rates based upon the staff's cost-of-service study as set forth in the record.

A.

As noted above, section 40-6-115(2) and (3) limits the district court to a narrow scope of review. Part of this review includes determining whether the Commission's findings of fact are based upon substantial evidence. Ram Broadcasting of Colorado, 702 P.2d at 750. Our review of the record indicates that the Commission's decision to shift $24 million in demand cost to the energy component of the demand-energy rate is not supported by substantial evidence.

After the Commission concluded, based upon the cost-of-service study, that the seasonally-differentiated demand-energy rate is necessary and appropriate for Colo-Ute, it disregarded the rates dictated by that same cost-of-service study and classified certain demand costs as energy costs in the rates finally adopted. Although the cost-of-service study revealed that 56 percent of Colo-Ute's costs were demand related and 44 percent energy related, the Commission then adopted

Wendling's recommendation to transfer a substantial amount of Colo-Ute's demand costs to the energy component of the rate, thereby assigning ultimately 32 percent of the utility's costs to the demand component, and 68 percent to the energy component. This change represents a shift from demand to energy of approximately 24 percent of the utility's actual costs.

During the hearing, Wendling testified that a time-of-day rate could not be properly calculated without further data, and that he had not asked Colo-Ute for off-peak demand billing data so that he could actually prepare a time of use seasonally-differentiated rate. He also stated that the surrogate-time-of-day rate adopted by him was without support in the Commission staff's own studies, in outside research, or in the technical literature. The following exchange which occurred during his cross-examination is instructive:

> QUESTION: And again, what is your authority, if there is any authority for such an assumption?
>
> ANSWER: I don't believe I have an authority.
>
> QUESTION: Okay. Have you done any --
>
> ANSWER: Other than myself.
>
> QUESTION: -- research on the development of the AED allocation factor that supports this?
>
> ANSWER: No.

> QUESTION: Can you give any reference in technical literature that you are familiar with which indicates that, where the AED method is characterized as being a proxy for base-load and peaking generation?
>
> ANSWER: Well, my previously referred to work papers on the time-of-day design did that.
>
> QUESTION: But as far as technical literature which might support that approach, can you refer me to anything which parallels your recommendation?
>
> ANSWER: I can't.

When Wendling was asked whether the approach he was recommending has ever been advocated by the Commission in other rate cases, he responded: "Well, it might have been but I am not familiar with them or what their intent was, or for what purposes they were advocated."[19]

Viewing the record as a whole, and in a light most favorable to the Commission, G&G Trucking, 745 P.2d at 216; Home Builders Ass'n, 720 P.2d at 560, we conclude that Wendling's unsupported opinion does not constitute substantial evidence necessary to uphold the decision of the Commission.[20] Home Builders Ass'n, 720 P.2d at 562-63.

B.

We have held that where an order of the Commission is issued solely as a matter of administrative convenience, or in the absence of sufficient investigation into pertinent

considerations, the order is arbitrary, capricious, and invalid. City of Montrose v. Public Utilities Comm'n, 197 Colo. 119, 123, 590 P.2d 502, 505-06 (1979) (commission's order arbitrary and capricious, where no study commissioned regarding cost-of-service breakdown, although study was feasible, and no discussion in commission's order of disparate service cost; therefore, order issued solely as a matter of administrative convenience). Further, orders of the Commission which are arbitrary and capricious must be set aside. Peoples Natural Gas Div. v. Public Utilities Comm'n, 698 P.2d 255, 265 (Colo. 1985); Colorado Municipal League v. Public Utilities Comm'n, 687 P.2d 416, 419 (Colo. 1984). See also Federal Trade Comm'n v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970) (adoption of significant policy change without sufficient study and explanation is arbitrary and capricious).

The same factors which cause us to conclude that the Commission's conclusions are not supported by substantial evidence, also lead us to find this portion of the Commission's decision arbitrary and capricious. The proposed shift to demand costs represents little more than an ad hoc and unsupported analytical shortcut invented and adopted simply because the necessary rate design studies had not been performed by the Commission staff. The evidence clearly shows that such a study was entirely feasible, had the staff collected the necessary data. The district court, therefore, was fully justified in holding that this portion of the Commission's order was arbitrary and capricious.

C.

As noted above, section 40-6-109(3) imposes on the Commission the requirement that a reported decision shall be accompanied by findings of fact. Moreover, section 40-6-

111(4)(a) obliges the Commission to determine whether the rate or charge issue violates sections 40-3-106(1) and -111. The factors relied upon by the Commission must be sufficiently clear to enable the court to engage in meaningful review of the Commission's decision. Caldwell v. Public Utilities Comm'n, 200 Colo. 134, 138, 613 P.2d 328, 332 (1980).

The Commission justified its decision to shift demand costs on the grounds that Colo-Ute makes use of coal-fired power plants which require a greater investment of capital than is needed for oil or gas facilities. The Commission failed to find, however, that the specific amount of demand costs shifted to the energy charge accurately corresponds to the incremental additional capital costs of coal plants in comparison with oil or gas facilities. Indeed, the Commission could not have made such a finding since no evidence was presented on this point.

We hold that the Commission failed to conform to the statutory requirements that its reported decisions be accompanied by adequate findings of fact.

D.

Finally, section 40-3-102 imposes upon the Commission a duty to prevent unjust discrimination in rates. Further, section 40-3-106(1) recognizes that such discrimination may manifest itself in a number of ways. We have previously held that one of the primary purposes of the Commission's regulatory scheme is "to insure that the rates charged are not excessive or unjustly discriminatory." Cottrell v. City & County of Denver, 636 P.2d 703, 711 (Colo. 1981).

ARCO and Exxon have alleged that the rate design ultimately approved by the PUC, with its accompanying shift

in demand costs, unlawfully discriminates in two ways: (1) It establishes a preference for winter users and, in effect, requires summer users to subsidize winter customers; and (2) creates a preference in rates for low-load factor customers at the expense of high-load factor customers, who would then pay excessive rates to subsidize preferred customers.

We need not resolve these claims, however, as the Commission's errors mandate that this portion of Decision No. C83-1176 be set aside.

In summary, we reject Colo-Ute's claim that this appeal is moot. We hold that the PUC possessed statutory authority to institute, on its own motion, Case No. 6076, to determine whether the tariffs filed by Colo-Ute were just and reasonable. The Commission's order that Colo-Ute adopt a seasonally-differentiated demand-energy rate is supported by adequate findings of fact and substantial evidence. We affirm the ruling of the district court setting aside that portion of the PUC's order which classified over $24 million of demand costs as energy costs.

Accordingly, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

JUSTICE ERICKSON concurs in part and dissents in part; JUSTICE LOHR and JUSTICE VOLLACK join in the concurrence and dissent.

1

The flat or all-energy rate does not differentiate between "demand" charges (fixed capital costs associated with the generation and transmission of electricity) and "energy" charges (variable operation and maintenance expenses, especially fuel costs). Instead, it recovers all costs -- both demand and energy -- from a uniform charge per kilowatt hour (kwh).

2

"Cost tracking" simply means that the rates charged for public utility service must "track" actual costs; in other words, the utility should accurately assign actual costs to the consumers who are causing those costs. Ideally, the rate schedule should be designed in such a way that the consumers receive accurate and clear price signals from the utility and adjust their economic behavior accordingly.

3

Under a seasonally-differentiated demand-energy rate, an electric utility charges its customers a rate which reflects separate charges for demand and energy costs. Such a demand-energy rate provides separate and distinct recognition to the two major cost components of producing electricity: capital and fuel. Seasonal differentiation refers to the imposition of different demand charges for summer and winter, reflecting the greater power load burdens placed on generating facilities during the winter months.

4

ARCO, Exxon, Colo-Ute, and the co-ops thereupon filed new applications for rehearing, reconsideration, and reargument of Decision No. C83-1392. Colo-Ute also filed a motion to stay the filing date for rates and tariffs under Decision Nos. C83-1176 and C83-1392. In Decision No. C83-1561, the PUC denied the applications and Colo-Ute's motion.

5

The district court found for the Commission on certain constitutional and administrative due process claims raised by Colo-Ute. It held that the Commission's procedures did not violate the Colorado Open Records Act, §§ 24-72-101 to -309, 10 C.R.S. (1982), or the due process clauses of the United States and Colorado Constitutions. Colo-Ute has not raised these claims on appeal.

6

A cost-of-service study is a generally recognized approach for allocating a utility's various fixed and variable costs based upon a utility's actual costs of service.

7

The PUC urges reversal of the district court's order. Colo-Ute and the co-ops request dismissal on mootness grounds, or, in the alternative, to affirm the order. Intervenors ARCO, Exxon, and Shell Western E&P, Inc. (SWEPI) (the successor in interest to Shell Oil Company), urge reversal of the district court's order on the jurisdictional issue and on the question of whether substantial evidence exists to support the rate design change promulgated by the PUC. On the issue of allocation of demand charges as energy charges, ARCO and Exxon request affirmance of the district court's order.

8

In its entirety, section 40-6-111(4)(a), 17 C.R.S. (1984), reads as follows:

> The provisions of this section relating to suspension of rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, or regulations pending the hearing and decision thereon shall not apply to cooperative

electric associations, but this subsection (4) shall not be construed to exempt such associations from any other provision of this section. Notwithstanding any other provision of law, no cooperative electric association shall establish, charge, or collect a discriminatory or preferential rate, charge, rule, or regulation which would be violative of section 40-3-106(1) or section 40-3-111. Upon complaint filed by any member or customer of a cooperative electric association or by any affected public utility, the commission shall determine whether the rate, charge, rule, or regulation in question is contrary to this section, section 40-3-106(1), or section 40-3-111.

9

Section 40-6-111(1)(a), (b), 17 C.R.S. (1984), reads as follows:

Hearing on schedules - suspension - new rates - rejection of tariffs.

(1)(a) Whenever there is filed with the commission any tariff or schedule stating any new or changed individual or joint rate, fare, toll, . . .the commission has power, either upon complaint or upon its own initiative, . . . but upon reasonable notice, to have a hearing concerning the propriety of such rate, fare, toll, . . . if it believes that such a hearing is required and that such rate, fare, toll, . . . may be improper.

(b) Pending the hearing and decision thereon, in the case of a public utility other than a rail carrier, such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation shall not go into effect; but the period of suspension of such rate, fare, toll, . . . shall not extend beyond one hundred twenty days beyond the time when

> such rate, fare, toll, . . . would otherwise go into effect unless the commission, in its discretion, and by separate order, extends the period of suspension for a further period not exceeding ninety days.

10

Section 40-6-111(2)(a), 17 C.R.S. (1984), provides in pertinent part:

> If a hearing is held thereon, whether completed before or after the expiration of the period of suspension, the commission shall establish the rates, fares, tolls, . . . proposed in whole or in part, or others in lieu thereof, which it finds just and reasonable. . . . All such rates, fares, tolls, . . . not so suspended, on the effective date thereof, which in the case of a public utility other than a rail carrier, shall not be less than thirty days from the time of filing the same with the commission, or of such lesser time as the commission may grant,shall [sic] go into effect and be the established and effective rates, fares, tolls, . . . subject to the power of the commission, after a hearing on its own motion or upon complaint, as provided in this article, to alter or modify the same.

11

In its answer brief, Colo-Ute provides us with the legislative history of H.B. 1441, the 1981 amendment eventually codified at section 40-6-111(4)(a). This information does not support Colo-Ute's position. In fact, some of the legislative history actually supports the position of the PUC. Governor Richard D. Lamm's message accompanying H.B. 1444 is instructive on this point:

> It [H.B. 1444] will allow REA rate increases to go into effect after 30 days from the time they are filed with the PUC, thereby eliminating costly delays presently incurred because of the lengthy hearing procedure. Should a complaint concerning the reasonableness of an increase occur, H.B. 1444 stipulates that only one complainant is necessary to require the PUC to review the new rate: Under existing law, 25 customers or prospective customers must complain before the PUC can intercede. . . . While streamlining the bureaucratic process for the rural electric cooperatives in rate setting, this legislation does not eliminate PUC control of facility development or other consumer protections.

H.R.J. 2309, 53rd Leg., 1st Sess., 1981 Colorado (emphasis added).

12

For decisions of other jurisdictions holding that their state's PUC possesses the power and authority to regulate rate design, see, e.g., Rhode Island Chamber of Commerce Fed'n v. Burke, 443 A.2d 1236, 1237 (R.I. 1982) (commission had authority to modify rate design submitted by electric utility); Central Main Power Co. v. Public Util. Comm'n, 416 A.2d 1240, 1247 (Me. 1980) (commission acted properly in regulating rate design proposal submitted by utility); Cascade Natural Gas Corp. v. Davis, 28 Ore. App. 621, 560 P.2d 301, 304 (1977) (authority to impose rate design different from that proposed by the utility is encompassed in statutory authority of commissioner to look after the interest of the utility's customers, to obtain a fair and reasonable rate and guard against discriminatory exactions).

13

The district court also held that it could discover "no findings in Decision C83-1176 which vitiates [sic] these findings previously made by the Commission [in C81-373, in which the Commission in 1981 approved an all-energy scheme for Colo-Ute]." The adequacy of the Commission's findings are discussed, infra. To the extent that the court below is imposing upon PUC decision-making the applicability of stare decisis principles, it is in error. We have held that:

> Because of the legislative character of rate-making, the Commission is not bound by its prior decisions or by any doctrine similar to stare decisis. Moreover, while consistency in administrative rulings is considered essential, and while agency rulings are entitled to great weight in subsequent proceedings . . . the appearance of arbitrariness is dispelled when new findings are made, as they were here, on the basis of new evidence and a new record.

Colorado-Ute Electric Ass'n v. Public Util. Comm'n, 198 Colo. 434, 540-41, 602 P.2d 861, 865 (1979) (citation omitted). See also B&M Service, Inc. v. Public Util. Comm'n, 163 Colo. 228, 232, 429 P.2d 293, 295 (1967) (doctrines of stare decisis as well as equitable estoppel are generally held not to apply to the determination of administrative tribunals).

14

The term "peak demands" refers to the maximum rate of customer electricity consumption (in kilowatts) occurring during a 15 or 20-minute interval for any given month. The term "coincidence of peak demands" expresses a relationship between a customer's and system's peak demands for a particular point in time.

15

Section 40-3-106(1)(a), 17 C.R.S. (1984), provides as follows:

> **40-3-106. Advantages prohibited - graduated schedules.** (1)(a) Except when operating under paragraph (b) of this subsection (1), no public utility, as to rates, charges, service, or facilities, or in any other respect, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any respect, either between localities or as between any class of service. The commission has the power to determine any question of fact arising under this section.

Section 40-3-111(1), (2), 17 C.R.S. (1984), provides in pertinent part:

> **40-3-111. Rates determined after hearing.**
> (1) Whenever the commission, after a hearing upon its own motion or upon complaint, finds that the rates, tolls, fares, . . . demanded, observed, charged, or collected by any public utility for any service, . . . or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, . . . are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, . . . the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, . . . to be thereafter observed and in force and shall fix the same by order. In making such determination, the commission may consider . . . factors which may affect the sufficiency or insufficiency of such rates, fares, tolls, . . . during the period the same may be in effect and may consider any

> factors which influence an adequate supply of energy and any factors which encourage energy conservation.
>
> (2) The commission has the power, after a hearing upon its own motion or upon complaint, to investigate a single rate, fare, toll, . . . or the entire schedule of rates, fares, tolls, . . . of any public utility; and to establish new rates, fares, tolls, . . . in lieu thereof.

16

Additional fuel is required as additional electric energy is consumed. A component of the electric power rates reflecting additional fuel costs is, therefore, also in keeping with the principle that rates should track costs.

17

A time-of-day rate varies the price of demand and/or energy over the hours of the day. Such a rate attempts to signal to customers the various costs associated with generating electricity throughout various periods of the day.

18

The "average and excess demand (AED)" allocation is a method used for allocating demand-related costs. It allocates a portion of the demand-related costs on the basis of "average" demand (kilowatt hour usage throughout the year) and the remainder of the demand-related costs on the basis of "excess" demand (the difference between the utility's peak and average demands).

19

Moreover, Gary Pearson [sic], Colo-Ute's supervisor of rate and cost analysis, testified that he could not think of "any articles concerning utilization of this type of rate in any other wholesale rate proceeding";

further, to his knowledge, "this rate concept [has never] been used in Colorado before."

20

See also Electricity Consumer's Resource Council v. Federal Energy Regulatory Comm'n, 747 F.2d 1511 (D.C. Cir. 1984). In that case, the court reversed the adoption by the Federal Energy Regulatory Commission (FERC) of a rate-making modification which effectively shifted demand costs to the energy component of the electric rate in question. The court held that the evidence failed to show that the modification would result in a rate which was cost tracking. In the words of that court: "[T]he commission appears to treat the demand charge like modeling clay in order to force the application of marginal cost pricing to the energy component." 747 F.2d at 1515.

Colorado-Ute Electric v. Public Utilities Commission
No. 86SA244

JUSTICE ERICKSON concurring in part and dissenting in part:

I would affirm the decision of the Public Utilities Commission of Colorado (PUC). I agree with the majority that this appeal is not moot and that the PUC had statutory authority to determine sua sponte whether the tariffs filed by Colorado-Ute Electric Association (Colo-Ute) were just and reasonable. I also agree with the majority that substantial evidence supports the PUC's order that Colo-Ute's proposed rate be replaced by a seasonally differentiated demand-energy rate. In my view, however, competent evidence supports the PUC's allocation of $24,084,126, representing part of the fixed capital costs of Colo-Ute's coal-fired plants, to the energy component of the formula used to determine the new rate. Accordingly, I would reverse the trial court and remand with directions to affirm the PUC's order.

I.

The PUC's order is supported by the testimony of Warren L. Wendling (Wendling),[1] a Public Utilities Engineering Analyst employed by the PUC. Generally, utilities employ three types of power plants to meet fluctuating demands for electricity. Coal-fired plants typically operate continuously. They are expensive to construct, but because of the low cost of coal, cheap to operate. The combined generating capacity of plants that a utility operates continuously is called the "base load capacity" of the utility.[2] When the demand for electricity exceeds the base load capacity, the utility typically uses either oil- or gas-fired plants to satisfy the "peaks" in demand.[3] These plants are cheap to build, but because of the high cost

of oil and gas, expensive to operate. Contrary to industry practice, Colo-Ute employs only coal-fired plants to meet all of its commitments to power users.

As an integral part of the PUC's rate determination, Wendling performed a cost-of-service study (study) to compute the utility's "cost of service," the total revenues required to cover the utility's cost of operation plus a fair return on its investment. The "cost of service" is used to set the demand-energy rates for each of Colo-Ute's customers.[4] The study allocates costs to each customer by dividing Colo-Ute's costs into numerous categories. The costs distributed to each category are adjusted to provide Colo-Ute with a reasonable rate of return and then allocated to each customer based in part on the customer's consumption of electricity. Wendling's study was the only cost-of-service study of Colo-Ute presented to the PUC.

In the cost-of-service study, Wendling followed generally accepted cost allocation methods, such as that contained in the NARUC Electric Utility Cost Allocation Manual. Generally accepted allocation methods assume that a utility uses either oil- or gas-powered plants to meet peaks in demand. Accordingly, Wendling concluded that the study results had to be modified to reflect Colo-Ute's investment in coal-powered plants to meet peaks in demand. Colo-Ute's use of coal-fired plants, rather than oil- or gas-powered plants, to meet surges in demand in excess of base load capacity results in lower fuel costs but higher plant construction costs (capital costs). To strictly follow the unmodified study results would defeat the purpose of the study itself; that is, the study's results would not accurately track Colo-Ute's actual cost of service.[5] Without appropriate adjustments, the demand-energy rates would cause non-peak users of electricity to subsidize peak users.

Accordingly, based upon his analysis of Colo-Ute's operations Wendling modified the results of his study by allocating $24,086,126, the plant capital costs required to supply peak demand, from the demand component of the demand-energy rate to the energy component. The modification caused customers to pay more for electricity used to satisfy peak demands than under the unadjusted rates.[6]

Based on the testimony of Wendling, the PUC made the following findings:

> Wendling testified that . . . there should be a recognition of the utilities' [sic] investment in thermal coal-fired generation plants. Investment in such plants minimizes the cost of fuel relative to investment in peaking plants with its attendant low capacity or capital costs and high fuel costs for fuels such as oil or gas.
>
> . . . Substantial portions of [Colo-Ute's coal-fired units] are being used for peaking purposes. In effect, units with high capital costs and low running costs have been substituted for units with low capital costs and high running costs in meeting Colorado Ute's [electrical needs]. Although such capital substitutions may accord with the national energy policy, it nevertheless creates an artificially high demand charge and an artificially low energy charge. Moreover, no recognition is given to the off-peak use of base load capacity.

The PUC examined Wendling's modification of the study results and concluded that the allocation would enable more accurate tracking of Colo-Ute's costs.[7]

II.

Atlantic Richfield Company (ARCO) and Exxon Corporation (Exxon), two customers of Colo-Ute who will pay higher power costs as a result of Wendling's modification, contend that the PUC's decision to modify the study results is not supported by substantial evidence. They argue that the capital costs of the coal-powered plants are "fixed costs" and can only be recovered in the demand variable of the demand-energy rate and that the allocation of $24,084,126 to the energy component of the rate was arbitrary and capricious. Finally, they claim that the PUC's prescribed energy rates are discriminatory in violation of sections 40-3-102 and -106, 17 C.R.S. (1984 & 1987 Supp.).

A.

In reviewing the propriety of the PUC's modification to the demand-energy rate, we must consider two issues: (1) whether the decision to modify the rate formula constituted an abuse of discretion and (2) whether the amount of the modification was supported by the record. Concerning the first issue, the PUC has broad discretion in determining rates, provided the rates are just and reasonable. Colorado Ute Elec. Ass'n, Inc. v. Public Util. Comm'n, 198 Colo. 534, 602 P.2d 861 (1979); Consumers' League v. Colorado & S. Ry., 53 Colo. 54, 125 P. 577 (1912); § 40-3-102. It is the result reached, not the method employed, which determines whether a rate is just and reasonable. City of Montrose v. Public Util. Comm'n, 629 P. 2d 619 (Colo. 1981). Orders of the PUC are presumed to be

just and reasonable. Id. at 623. Rate-making is not an exact science but a legislative function involving many questions of judgment and discretion based upon a myriad of factors including evidentiary facts, calculations, known factors, and adjustments that may affect the relationship between known factors. City of Montrose, 629 P.2d at 623; Colorado Ute Elec. Ass'n, 198 Colo. at 539, 602 P.2d at 864. A reviewing court has neither the expertise nor resources of the PUC and, absent a clear abuse of discretion, should not substitute its judgment for that of the PUC. Atchison, T. & S. F. Ry. v. Public Util. Comm'n, 194 Colo. 263, 572 P. 2d 138 (1977).

In my view, the decision to modify the demand-energy rate formula was not an abuse of discretion. The PUC found, based on competent evidence, that the cost-of-service study did not accurately track Colo-Ute's costs because the study's cost allocations assumed that oil- and gas-powered plants would be used to meet peaks in power demand. The assumption of the study was inappropriate in this case since Colo-Ute employed only coal-fired plants to meet peaks in energy demand. The unmodified rates also failed to realize a policy goal of the PUC. The rates, by not charging increased costs for electricity used to supply peaks in demand, would not encourage Colo-Ute's customers to conserve energy and encourage Colo-Ute to improve its load factor.[8] Although the ability of the PUC to effect social policy through rate-making is limited, Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P.2d 495 (1979), the PUC has a duty to protect the public from unreasonable and unjust rates and to prevent destructive rate-making that could adversely affect the availability of service to the public. Consolidated Freightways Corp. v. Public Util. Comm'n, 158 Colo. 239, 406 P.2d 83 (1965); see Consolidated Gas Supply Corp. v. Federal Power Comm'n, 520 F.2d 1176 (D.C. Cir. 1975) (holding federal

power commission's adoption of new rate formula, shifting a greater proportion of capital costs from the demand component to the commodity component of the rate formula, to be just and reasonable where the modification was supported neither by technical research nor by commission studies); Fuels Research Council, Inc. v. Federal Power Comm'n, 374 F.2d 842 (7th Cir. 1967) (recognizing federal power commission's broad discretion in using rate formulas to achieve policy goals); State Corp. Comm'n v. Federal Power Comm'n, 206 F.2d 690 (8th Cir. 1953) (affirming power commission's adoption of new rate formula that was supported neither by technical literature nor by commission studies or research), cert. denied, 346 U.S. 922 (1954). Considering the innumerable factors that must be identified and quantified to determine rates, scientific precision in rate-making is not always possible and the PUC must be accorded broad discretion in setting rates. Accordingly, since the impact of the modified rate on Colo-Ute and its customers is just and reasonable, the modification of the rate was not an abuse of discretion.

B.

The second issue raised by ARCO and Exxon is whether the amount of the modification, $24,084,126, is supported by the record. Section 40-6-115(3), 17 C.R.S. (1984), limits the scope of judicial review to determinations whether a PUC decision is unconstitutional, "whether the decision . . . is just and reasonable," and "whether its conclusions are in accordance with the evidence." It is well established that the findings and conclusions of the PUC on disputed questions of fact, when based on competent evidence, are final and must be upheld on judicial review.[9] See, e.g., Mellow Yellow Taxi Co. v. Public Util. Comm'n, 644 P.2d 18 (Colo. 1982); Contact-Colorado Springs, Inc. v. Mobile Radio Tel. Serv., Inc., 191 Colo. 180,

551 P.2d 203 (1976). While the factual findings of the PUC need not be presented in any particular form and may even be implied, the findings must be discernible to the reviewing court. Caldwell v. Public Util. Comm'n, 200 Colo. 134, 613 P.2d 328 (1980).

In my view, the amount of the modification is supported by competent evidence and must be upheld on review. Based upon his analysis of Colo-Ute's operation and his calculations, Wendling stated that a modification of the rate formula in the amount of $24,084,126 was necessary to permit accurate tracking of Colo-Ute's costs.[10] Although a time-of-day rate would also have enabled accurate tracking of Colo-Ute's costs, Wendling testified that that rate would be much more difficult to implement and would provide less accurate results. Accordingly, the modification of the demand-energy rate must be upheld on review.

III.

Finally, ARCO and Exxon contend that the PUC's prescribed energy rates are discriminatory in violation of sections 40-3-102 and -106, 17 C.R.S. (1984 & 1987 Supp.). They claim that the PUC's modifications to the demand-energy rate do not accurately track actual costs and are discriminatory because they cause some users to subsidize rates of other users. They argue that the modified rates (1) favor winter users and discriminate against summer users and (2) favor customers with fluctuating demand for electricity during the year and discriminate against those customers with relatively constant demand each year.

Section 40-3-102 provides that the PUC has authority "to prevent unjust discriminations" in rates, charges, and tariffs.

(Emphasis added.) Section 40-3-106(1) states that "no public utility shall . . . make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage" and that no utility "shall establish or maintain any unreasonable difference . . . in any respect, either between localities or as between any class of service." (Emphasis added.) In Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P.2d 495 (1979), we found a violation of section 40-3-106(1) when the PUC ordered utility companies to provide a lower rate to low-income elderly and low-income disabled persons that was "unrelated to the cost or type of service provided." Id. at 59, 590 P.2d at 498 (emphasis added).

In this case, the modification of the demand-energy formula is related to the actual costs of Colo-Ute to supply users and violates neither section 40-3-102 nor -106. On the contrary, the modification prevents non-peak users from subsidizing peak users and avoids the type of unjust discrimination raised by ARCO and Exxon. The unadjusted demand-energy rates endorsed by ARCO and Exxon discriminate against certain users since the rates do not accurately reflect Colo-Ute's costs. Competent evidence in the record supports the PUC's conclusion that the modified rates accurately reflect Colo-Ute's costs and therefore charge Colo-Ute's customers fairly.

Accordingly, I would reverse the district court and remand with directions to affirm the PUC.

I am authorized to say that JUSTICE LOHR and JUSTICE VOLLACK join in this dissent.

1

The qualifications and experience of Wendling was admitted as evidence. Wendling has a bachelors degree in electrical engineering, a masters degree in science, and a masters degree in business administration. He is a registered professional engineer in Colorado with over eight years' experience in electrical engineering. He has previously testified as an expert witness before the PUC in other cases involving rate determinations.

2

"Base load" units are those units that are in continuous operation and "base load capacity" is the generating capacity of those units. Mississippi Indus. v. Federal Regulatory Comm'n, 808 F.2d 1525 (D.C. Cir.), vacated in part, 814 F.2d 773 (D.C. Cir.), opinion reinstated, 822 F.2d 1103 (D.C. Cir.), cert. denied, 108 S. Ct. 500 (1987). The "generating capacity" of a power plant refers to the maximum amount of electricity that it can generate.

3

Peak demand refers to demand in excess of base load capacity. The plants used to meet peaks in demand are called "peaking plants." The typical period of peak demand for utilities is during the winter, when energy demand far exceeds demand during other times of the year. During non-peak periods, demand is typically met by the base units, which are generally coal powered plants. When the demand of cooperative members is less than base load capacity, Colo-Ute sells the unused capacity to non-members.

4

The demand variable is a component used to determine the demand-energy rate and is the sum of several components, including a generation component. The generation component is based on total average and excess demand (also called "Average and Excess Demand"), which is the sum of the average demand and excess demand figures. Demand-related costs are

allocated by the generation component based on "average demand" (annual kilowatt hour usage) and "excess demand" (difference between the utility's peak and average demands).

5

Wendling testified:

> The energy charge was computed [after the demand charge]. Here Staff is proposing only for generation costs to recognize the increase[d] investment in demand related dollars made by Colorado-Ute in its generating plant so that they can burn coal. A utility can minimize its investment in generation plant by constructing oil or gas fired generators. However, a fuel cost penalty is [incurred]. On the other hand a utility may expend more capital and build a coal fired unit and burn a lower priced fuel. Therefore, this additional investment should be recovered in the energy charge. To accomplish this consistent with the cost of service methodology the average portion of the average and excess demand allocation factor was split. . . .

6

Wendling testified that another way to accurately track Colo-Ute's costs is through a time-of-day rate. He stated that a portion of the average demand component of the average and excess demand allocation for Colo-Ute should be recovered in the energy charge since that component is analogous to the base load portion of generating capacity. In time-of-day rates, the costs of base load generating capacity are recovered through the rate's energy component. He stated that a similar formula was used in two prior PUC rate determinations. According to Wendling, his rate design tracked costs better than time-of-day rates and was much easier to

implement. The PUC and Wendling use the terms "time-of-day rate" and "time-of-use" rate interchangeably.

7

Other pertinent parts of the PUC order stated:

> One way to address [Colo-Ute's investment in coal fired plants to meet peaks in demand] is by the use of a time-of-use rate which would recognize the use of capacity at the time it occurs.
>
> The disadvantages of a time-of-use rate, of course, is the increased complexity of metering and billing and the need to perform cost allocation studies for the distribution cooperatives. As a surrogate for such a rate, Mr. Wendling proposed a modification of the demand-energy rate. In this modified rate, the dollars of generation costs associated with the average portion of the [average and excess demand] allocation were spread into the energy charge. Mr. Wendling testified that for the Colorado-Ute system, the amount so calculated approximated very closely the dollars of base load generation that would have been spread to all hours by a time-of-use rate.

8

A customer's annual "load factor" is the percentage relationship of its average daily demand (annual use/365) to its maximum daily demand. Northern Ind. Pub. Serv. Co. v. Federal Energy Regulatory Comm'n, 782 F.2d 730 (1986). Concerning the modification of the demand-energy rate, the PUC order stated:

> . . . For Colorado-Ute's particular load shape and seasonality, the excess portion of the AED [average and excess demand] is a proxy for the peaking portion of the generating facilities. This peaking capacity was allocated on the basis of coincident peak demand recognizing that the members exhibit a high coincidence with the Colorado-Ute system peak. Placing only the excess portion of the AED allocation in the demand charge provides an automatic incentive to Colorado-Ute to improve its system load factor since the higher the load factor becomes, the higher is the proportion of generation costs collected in the energy charge and the lower is the demand charge. This provides the incentive to maintain and improve the system load factor that was absent in the flat energy rate. . . . This should, if applied in conjunction with an effective resource management plan, produce essentially a flat rate, the very rate Colorado Ute seeks to employ. This rate form has the additional advantage that, in the present application, it comports with the regulatory objective of rate stability.

9

We have also held that the PUC's findings and conclusions may be set aside or modified if not supported by substantial evidence. See, e.g., City of Montrose, 629 P.2d at 622; Public Util. Comm'n v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930). The substantial evidence standard requires a party challenging the findings and conclusions of the PUC to carry a heavy burden.

> Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a

> conclusion," . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

National Labor Relations Bd. v. Columbian E. & S. Co., Inc., 306 U.S. 292, 300 (1939) (quoting Consolidated Edison Co. v. National Labor Relations Bd., 305 U.S. 197, 229 (1938)). See generally 5 K. Davis, Administrative Law Treatise § 29:5 (2d ed. 1984)(discussing substantial evidence standard). In my view, the PUC's findings and conclusions in this case are supported by substantial evidence.

10

Wendling's opinion that a modification in the amount of $24,084,126 was necessary was based on the staff's separation of demand functionalized costs and revenues. See supra note 5. The $24,084,126 is the sum of the total of the average demand portion as set forth in Exhibit 60 in the PUC hearing.

DISTRICT COURT, MONTROSE COUNTY, COLORADO

Civil Action No. 83 CV 218

ORDER

COLORADO-UTE ELECTRIC ASSOCIATION, INC.;
DELTA-MONTROSE ELECTRIC ASSOCIATION;
EMPIRE ELECTRIC ASSOCIATION, INC.;
GRAND VALLEY RURAL POWER LINES, INC.;
GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.;
HOLY CROSS ELECTRIC ASSOCIATION, INC.;
INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION;
LA PLATA ELECTRIC ASSOCIATION, INC.;
SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.;
SAN ISABEL ELECTRIC ASSOCIATION, INC.;
SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.;
SAN MIGUEL POWER ASSOCIATION, INC.;
SOUTHEAST COLORADO POWER ASSOCIATION;
WHITE RIVER ELECTRIC ASSOCIATION, INC.; and
YAMPA VALLEY ELECTRIC ASSOCIATION, INC.,

Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; CHERYL MUHOVICH; UNION CARBIDE CORPORATION; SHELL OIL COMPANY; EXXON

COMPANY, U.S.A.; ATLANTIC RICHFIELD COMPANY; and CITY OF DELTA, COLORADO,

Respondents.

AND

DISTRICT COURT, MONTROSE COUNTY, COLORADO

Civil Action No. 84 CV 07

ORDER

ATLANTIC RICHFIELD COMPANY and EXXON CORPORATION,

Petitioners.

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; COMMISSIONERS EDYTHE S. MILLER, RONALD L. LEHR, AS SUCCESSOR TO FORMER COMMISSIONER DANIEL E. MUSE, ANDRA SCHMIDT, AS SUCCESSOR TO FORMER COMMISSIONER CLARENCE RAYMOND CLARK, III and COLORADO-UTE ELECTRIC ASSOCIATION, INC.,

Respondents,

and

SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.; YAMPA VALLEY ELECTRIC ASSOCIATION, INC.; INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION; CHERYL MUHOVICH; WHITE RIVER ELECTRIC ASSOCIATION, INC.; SAN ISABEL ELECTRIC ASSOCIATION, INC.; SANGRE DE CRISTO ELECTRIC ASSOCIATION, INC.; GRAND VALLEY RURAL POWER LINES, INC.; DELTA-MONTROSE ELECTRIC ASSOCIATION; HOLY CROSS ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; CITY OF DELTA, COLORADO; UNION CARBIDE CORPORATION; WESTERN SLOPE ENERGY RESEARCH CENTER; WESTERN COLORADO CONGRESS; SHELL OIL COMPANY; SAN MIGUEL POWER ASSOCIATION, INC.; GUNNISON COUNTY ELECTRIC ASSOCIATION, INC.; LA PLATA ELECTRIC ASSOCIATION, INC.; and SOUTHWEST [sic] COLORADO POWER ASSOCIATION,

Intervenors.

This matter coming on for hearing this 12th day of March, 1985, and the Court receiving argument of counsel, being advised in the parties' briefs, reviewing the record, and being otherwise advised in the premises, hereby enters the following order:

83 CV 218

I. HISTORY

Colorado-Ute Electric Association, Inc. (hereinafter referred to as Colorado-Ute) generates and transmits electrical power on a wholesale basis to fourteen member electrical cooperatives

(hereinafter referred to as Co-ops), which in turn, sell the electrical power on a retail basis to electrical consumers. The Co-ops are consumer-owned and also have representatives on the Board of Directors of Colorado-Ute, which is a non-profit corporation.

Colorado-Ute filed Advice Letter Number 45 with the Public Utilities Commission (hereinafter referred to as the Commission or PUC) on December 15, 1981, to increase its revenue by approximately 12.157%. At this time, Colorado-Ute's pricing rate to its fourteen member Co-ops was on a flat rate, that is, a flat rate per kilo-watt [sic] hours used. This method of charging had previously been approved by the PUC on February 24, 1981, in Decision No. C81-373. No member co-op is charged under a demand-energy rate. As a result of Advice Letter Number 45, the PUC instituted Case No. 6076 and set the matter for hearing.

The hearing was held over several days in October and November of 1982, and none of Colorado-Ute's member Co-ops complained to the PUC about the rate increase or the pricing rate. As a result of the hearing, the PUC granted the request for the increase in revenue but required Colorado-Ute to change from charging its member Co-ops on a flat rate to requiring Colorado-Ute to institute what was called a seasonably-differentiated demand-energy rate. As a result of the hearings in Case No. 6076, the PUC issued Decision No. C83-1176, dated July 26, 1983. A re-hearing was held and the PUC issued Decision No. C83-1392 on September 7, 1983, which denied the application for re-hearing by Colorado-Ute and granted, in part, some of the requests filed by Exxon and Arco. Applications for re-hearing were again filed, and by Decision No. C83-1561, the Commission denied those applications.

On October 21, 1983, Colorado-Ute and the twelve member Co-ops filed a petition for writ of certiorari in the Montrose District Court and also filed a motion for stay or suspension of the PUC's decisions. The motion for stay or suspension of the Commission decisions was granted on January 16, 1984, and a briefing schedule was then set forth for the parties.

II. GROUNDS FOR REVIEW

Colorado-Ute alleges that the Commission decisions outlined above are unlawful, arbitrary, capricious, unjust, unreasonable and abuse of discretion and violate their rights under the Constitutions of the United States and the State of Colorado and that the PUC has not regularly pursued its authority and has rendered decisions upon findings and conclusions not in accordance with the law and the evidence of record. Colorado-Ute and the member Co-ops make the following assertions:

1. The Commission does not have jurisdiction to investigate the filing of a tariff or schedule under C.R.S. 1973, 40-6-111(4) by a cooperative electric association where no member or consumer of such cooperative or affected public utility has filed a complaint, as required by Section 40-6-111(4), which provides in part:

> "Notwithstanding any other provision of law, no cooperative electric association shall establish, charge, or collect a discriminatory or preferential rate, charge, rule, or regulation which would be violative of Section 40-3-106(1) or Section 40-3-111. Upon complaint filed by any member or customer of a cooperative electric

> association or by any affected public utility, the Commission shall determine whether the rate, charge, rule or regulation in question is contrary to this section, Section 40-3-106(1), or Section 40-3-111."

C.R.S. 1973, 40-3-106 prohibits a public utility from making any preferential or advantage or subjecting any corporation or person to any prejudice or disadvantage. C.R.S. 1973, 40-3-111 provides that whenever the PUC, after hearing, finds that rates, charges, classifications, regulations or practices, etcetera, are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law or that they are insufficient, the Commission shall determine the just, reasonable or sufficient rates, rules, regulations, etcetera, and may consider any factors which influence an adequate supply of energy and any factors which encourage energy conservation. This particular statute also allows the PUC, upon its own motion or upon complaint, to investigate the matter and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, practices, or schedules, in lieu of the previous existing matters.

Several statutes contained within the public utilities law grant the PUC the authority and the power to conduct hearings and investigations as to the propriety of rates, charges, classifications, etcetera, upon the filing of a complaint or on its own motion. In contrast, this statute, 40-6-111(4)(a), permits that authority only upon the filing of a complaint by any member or customer of a cooperative electric association or by any affected public utility. Subparagraph (4)(a) removes the power of the PUC to suspend rates, fares, tolls, rentals, charges, classifications, practices, rules or regulations pending a hearing, and does not provide that the PUC, of its own motion, may

hold such hearings. Even upon complaint, Subparagraph (4)(a) limits the Commission's determination to whether or not the rate, charge, rule or regulation in question is contrary to 40-6-111, 40-3-106(1) or 40-3-111. Here we have a specific statutory scheme set out by the legislature and the general rule is set forth in State v. Dayhoff, et al., 609 P.2d 119 (Colo. 1980), in which the court stated:

> "Finally, we adhere to the well-established rule that where specific and general statutes conflict, the provisions of the specific statute prevail [citations omitted]."

While the legislature has enacted numerous general and specific statutory provisions relating to public utilities in general, 40-6-111(4)(a) is a specific statutory provision relating to cooperative electric associations, and must be followed. To hold otherwise would be to create nonsense out of what appears to the Court to be a very clear and unambiguous statute and to defeat the obvious legislative intent of the Legislature. People v. Meyers, 182 Colo. 21, 510 P.2d 430 (1973). The Court therefore finds that the PUC does not have the authority pursuant to C.R.S. 1973, 40-6-111 (4), without complaint as provided by statute, to change the rate design of an elective [sic] cooperative such as Colorado-Ute.

2. Colorado-Ute argues that the PUC may not reject a tariff by a cooperative electric association and direct the cooperative to file a new tariff or schedule without finding that the original tariff or schedule was unjust, unreasonable, discriminatory, preferential or otherwise in violation of the law, and without further finding that the new tariff or schedule ordered by the Commission is just, reasonable, non-discriminatory, non-preferential, or not unlawful.

This particular point was addressed in Decision No. C83-1392 at Page 3. This was the re-hearing order in Case No. 6076 which essentially denied the petitioner's application for re-hearing and affirmed its previous order in Case No. 6076, that is, its Decision No. C83-1176. At Page 3 of that Decision, the PUC rejected Colorado-Ute's argument that the PUC was required to find that Colorado-Ute's rate schedules were unjust and unreasonable and that the rates ordered by the PUC were just and reasonable, relying on the case of Aspen Airways, Inc. v. Public Utilities Commission, 169 Colo. 56, 453 P.2d 789 (1969) holding that the findings of the Commission need not take any particular form and that certain findings of the Commission may be implied. The Commission thereupon made the following finding:

> ". . . since, in Colorado-Ute's view, the record does not contain any competent evidence that a unit pricing rate, which charges everyone the same cents per kilo-watt [sic] hour, is unjust, unreasonable, discriminatory, preferential, or in violation of the law, we shall nonetheless explicitly state that Colorado-Ute's rate structure is in fact unjust, unreasonable, discriminatory, and preferential, and that its unit pricing rate is not cost tracking for the reasons set forth in Decision No. C83-1176. By the same token, we explicitly find the rate schedule proposed by the staff of the Commission, as a result of its cost-of-service study, being a demand-energy rate with seasonally differentiated demand charges for summer and winter and an annualized energy charge on a uniform kwh basis, is more nearly cost tracking than that proposed by

> Colorado-Ute, and accordingly, the staff rate is, in fact, just and reasonable and should be adopted."

The whole tenor of Decision No. C83-1176 as it relates to rate design is one of personal preference on the part of the Commission as opposed to specific findings of fact which would support a new rate design. The essence of the PUC findings is that the seasonally differentiated demand-energy rate, based on the PUC staff's cost-of-service study, is more cost tracking, provides an accurate price signal, and will encourage a more effective resource management plan. The apparent basis for requiring the implementation of a demand-energy rate is found at Page 16 of Decision No. C83-1176 wherein the Commission found that the Colorado-Ute members exhibit a high coincidence of demand with the Colorado-Ute system peak and therefore demand-energy rates are appropriate for Colorado-Ute. The Commission found that because the total cost per unit of output varies monthly, that this condition resulted in an uneconomic under-utilization of capacity.

In coming to this conclusion, the Commission ignored the evidence presented by Colorado-Ute and the member Co-ops that a combination of a flat energy rate charge and proper resource management will have the same effect. The Commission did not accept the notion that the overall economic conditions, such as the recession and surplus energy in the region has made Colorado-Ute less able to sell energy to non-members so as to more effectively use its plants, however, the Commission stated that these factors were imponderable at best. However, this ignores C.R.S. 1973, 40-3-111(1) which provides in part:

> ". . . any may consider any factors which influence an adequate supply of energy and any factors which encourage energy conservation."

Strangely, the Commission, at Page 22 of its Decision in C83-1176 found that the use of the demand-energy rate, if applied in conjunction with an effective resource management plan, would produce essentially a flat rate, the very rate Colorado-Ute seeks to employ. The Commission further stated that this rate form would have the additional advantage of rate stability which is a regulatory objective.

There does not appear to be any evidence to support that conclusion, and on the contrary, it is difficult to conceive a more stable rate than the flat energy rate currently used by Colorado-Ute. Since the result of the proposed energy-demand rate sought to be instituted by the Commission, in conjunction with an effective resource management plan, is essentially a flat rate, it is extremely difficult to see why the flat energy rate currently employed by Colorado-Ute, in conjunction with an effective resource management plan, needs to be changed. Based upon the Commission's findings contained in Decision No. C83-1176, it is clear that the Commission has simply preferred its own rate design over that employed by Colorado-Ute, and as such, should be set aside. The Colorado Supreme Court in Public Utilities Commission v. Colorado Motorway, Inc., 165 Colo. 1, 437 P.2d 44 (1968) stated that:

> "There is no question, as an abstract proposition of law, that the Commission has broad constitutional and statutory authority. However, the breadth of that authority is to be tested by the statutes themselves and not by the unbridled whim of the Commission. The Commission is

> a creature of statute. Both the power and the scope of its authority and its procedures are necessarily controlled by the act upon which it relies."

C.R.S. 1973, 40-6-111(4), specifically provides:

> "The Commission shall determine whether the rate, charge, rule, or regulation in question is contrary to this section, Section 40-4-106(1) or Section 40-3-111."

The Commission has made no such findings in any of its decisions regarding Case No. 6076, and a review of the record indicates that no such findings can reasonably be made. The bootstrap attempt to do so in Decision No. C83-1392 makes no additional findings than those contained in the original Decision No. C83-1176. Nothing in the record supports the boldfaced conclusions stated by the Commission on Page 3 in Decision No. C83-1392 that the flat energy rate currently charged by Colorado-Ute is discriminatory, preferential, creates an advantage, or otherwise violates 40-3-106(1) or 40-3-111. Further, it appears that the requirement by the Commission that Colorado-Ute implement a new rate design was of its own motion, based on staff recommendations without the filing of a complaint by any member or customer of a cooperative electric association or by any affected public utility. The Court does agree with the Commission that Colorado-Ute can hardly claim surprise after going through several days of hearing [sic] when it appears from the record that the question of rate design was the primary concern, however, that does not alter the statutory requirement that a complaint must be filed. Therefore, the Court finds that the Commission improperly considered the rate design which was not requested by Advice Letter No. 45.

Findings 1 and 5 on Page 22 of Decision C83-1176 are the closest thing to findings which would support the Commission's decision pursuant to 40-3-106(1), being that Colorado-Ute's costs are not uniform at all levels of output, and that the demand-energy rate more directly tracks cost than a flat rate. However, there is no finding that this is an unreasonable difference as to rates or charges between localities or class of service. As outlined earlier, based on the Commission's own findings, either rate design coupled with an effective resource management plan will produce essentially the same result. The record does not support the contention that any such findings pursuant to 40-3-106, 40-3-111 or 40-6-111 can be made, and the Commission made no such findings.

The Court does agree with the Commission in Decision No. C83-1392 that certain findings of the Commission may be implied, and the fact that the Commission did not specifically determine that the demand-energy rate ordered by the Commission was just, reasonable or sufficient is of no particular consequence. The whole tenor of Decision No. C83-1176, is that the Commission felt that its proposed rate design was just, reasonable and sufficient, however, these findings, both implied and stated, are conclusive in nature and are not supported by any factual findings based on the record.

Colorado-Ute argues that, while the Commission found that the revenue increase sought by Colorado-Ute was reasonable and should be granted, that the new rate design did not take into consideration whether or not they would be sufficient pursuant to 40-3-111. The rate design and rate proposed by the Commission failed to take into account the uncontroverted testimony that the proposed rate would raise revenue when Colorado-Ute's monthly costs are at its lowest point and lower the rates when its monthly costs are highest. The Commission

found that the TIER of 1.31 would be reasonable and that the proposed rate design and rate would provide Colorado-Ute with a margin of safety in meeting its indenture requirements, however, there is nothing in the record to indicate how this would be done. The expectation, of course, is that this would average out over a calendar year, but does not take into account the financial difficulties which apparently would be encountered by Colorado-Ute in the summertime, resulting in increased short-term borrowing by Colorado-Ute. This also did not take into account the increased costs associated with a changed billing procedure and acquisition of equipment and meters necessary to implement the changeover. There is no indication, except conjecture, that such rates would be sufficient and would allow Colorado-Ute to achieve the TIER level.

3. Colorado-Ute next argues that the Commission may not disregard the convenience and preference of Colorado-Ute and its member Co-ops in designing rates for electrical service by substituting the Commission's own rate design.

In this case, Colorado-Ute by its Advice Letter No. 45 was not seeking to change its existing rate design, but merely seeking an increase in that rate. The record is clear that Colorado-Ute and all member co-ops which provided testimony before the Commission supported a unit pricing rate, that is, the flat energy rate. People's National Gas Division v. Public Utilities Commission, 193 Colo. 421, 567 P.2d 377 (1977) notes that unless there is a substantial showing that rate payers are prejudiced materially by the managerial options in the area of capital financing, such matters are within the realm of sound management discretion of the public utility. That case dealt with capital financing as opposed to rate design, however, the principle remains the same. Although an old case, this principle was also followed in Refining Co. v Public Utilities Commis-

sion, 68 Colo. 137 (1920), determined that the cancelling of an existing rate in a contract could only be done if the Commission determined that the contract rate was detrimental and injuriously affected the public welfare. That case requires the Commission to determine that the rate is so unreasonable as to be detrimental to the public interests before the Commission may establish the new rate. Even in this case, the court was talking about the rate as opposed to a new rate design. Also see 73B C.J.S., Public Utilities, § 19. There is no evidence of a substantial showing that the rate payers are being materially prejudiced by the unit pricing rate and apart from the staff, as outlined earlier, only the intervenors such as Union Carbide and Exxon, which would benefit from the new rate design, opposed the unit pricing rate.

The Commission ignored substantial testimony in the record by the member Co-ops in which they testified that if Colorado-Ute were forced to charge them on an energy-demand rate, they in turn would have to charge their consumers on the same basis. Not only would this necessitate a change in billing and metering by Colorado-Ute, and therefore increase the cost, but the same effect would apply to the member Co-ops and the end use consumer. This, contrasted against the questionable benefits of going to an energy-demand rate does not support the Commission's findings.

The Court finds that the Commission's action in changing Colorado-Ute's rate design from a flat energy rate to a seasonally adjusted demand-energy rate is an unwarranted intrusion into the management prerogatives and discretion of Colorado-Ute. The Commission itself in Decision No. C81-373, February 24, 1981, approved a flat energy rate for Colorado-Ute. Page 4 of that Decision recites several findings made by the Commission in this regard and the Commission in that Deci-

sion notes that the costs to Colorado-Ute to generate power are basically constant and uniform, and that a flat energy rate would recover both the demand cost and the energy cost on the basis of usage. The Court can find no findings in Decision No. C83-1176 which vitiates these findings previously made by the Commission, and although the Commission has general authority to correct managerial abuses of discretion which adversely or injuriously affect the public interest, no such findings have been made. As stated in Public Service Co. v. Public Utilities Commission, 653 P.2d 1117 (Colo. 1982), the management of the public utility belongs to the company. And where, as here, there is no evidence or findings of abuse, the Court can only conclude that the Commission is substituting its own personal preference in managerial matters and has exceeded its statutory authority.

Based upon the record, it is clear that the Commission totally ignored the evidence and the testimony presented by Colorado-Ute and the member Co-ops concerning the flat energy rate. The Court concurs with Mr. James at Page 13 of his brief wherein it is noted that Colorado-Ute and the member Co-ops have had an experience factor with both a flat energy rate structure and a demand-energy rate structure and all, without exception, from a managerial point of view, favor the flat energy rate. This is particularly highlighted by the fact that, while Colorado-Ute only wholesales power to the fourteen member Co-ops, the member Co-ops retail this electrical power to the use of the consumer. Their testimony, particularly as it relates to an understandable pricing signal and general wants of the public, cannot be minimized. This is particularly true since Colorado-Ute and the fourteen member Co-ops are all non-profit, consumer-owned, cooperatives. It is extremely difficult to ascertain any improper motivation on the part of their collective managements which would cause them to prefer a flat

energy rate. Certainly the profit motive does not exist, and it is difficult to see any irresponsibility in their wanting to keep the flat energy rate.

4. Colorado-Ute next argues that its right to due process under the Fourteenth Amendment to the United States Constitution and under Article II, § 25 of the Colorado Constitution, was violated by admitting testimony based on the WASP-82 computer analysis, and that the Commission violated C.R.S. 1973, 24-72-304 (The Colorado Open Records Act), in refusing to provide Colorado-Ute with a copy of the WASP-82 computer program.

The Court rejects this argument advanced by Colorado-Ute. Hearings in this case were held before the Commission on seven separate days between October 6, 1982, and ending November 16, 1982. While Colorado-Ute is entitled to due process as set forth in Mountain States T. and T. Co. v. Department of Labor, 184 Colo. 334, 520 P.2d 586 (1974), a review of the record discloses that Colorado-Ute did not receive information on the WASP-82 analysis and did sponsor testimony as a result thereof. This matter was discussed at length at the hearing date on October 26, 1982, and again on November 15, 1982. Colorado-Ute erroneously stood on their objection and did not cross-examine staff witness Mr. Wendling, and did so at their own peril. Based upon the application for re-hearing, the Commission in its Decision No. 1392 addressed this issue on Pages 3 and 4 of that Decision, and a review of the record in that regard clearly substantiates the Commission in that regard. The Court therefore finds that the Commission neither violated the Colorado Open Records Act nor Colorado-Ute's right to due process under the Fourteenth Amendment to the U.S. Constitution or Article II, § 25 of the Colorado Constitution.

5. The record does not support the conclusions reached by the PUC as to the applicability of the demand-energy rate to the Colorado-Ute system.

The Commission relied heavily upon Exhibit 94 in an attempt to show a high coincidence between the system's peaks and the members' peaks, however, that Exhibit does not appear to accurately track all of the data available to determine coincidence of peaks. Page 1 of that Exhibit, listing the date and time of occurrence of member system peaks, together with the Colorado-Ute system peak "date hour", shows that the peaks are not nearly as coincident as believed by the Commission. It appears from the testimony in the record that the applicability of the demand-energy rate to the Colorado-Ute system is only appropriate if the peak demands are highly coincident. Further, the testimony indicated that the demand energy rate acts as a functional surrogate for time-of-day rates, and that time-of-day rates are not relevant at this point in time for the Colorado-Ute electric system. In short, there does not appear to be sufficient competent evidence for the Commission to conclude that either the demand-energy rate is most appropriate for Colorado-Ute because of the high degree of coincidence of peaks, nor that the demand energy rate is the most cost tracking rate available for Colorado-Ute.

III. CONCLUSION

WHEREFORE, based upon the foregoing, the Court hereby directs that the order of the Commission in Decision No. C83-1176 requiring Colorado-Ute Electric Association, Inc. to file rates and tariffs reflecting the rates set forth in Appendix B of said order is hereby set aside and is of no force and effect. Paragraph 3 of said order is hereby affirmed, and Colorado-Ute Electric Association shall submit to the Commission a feasibility study of a load research program as contained in the

Commission's order. Further, the suspending bond filed by Colorado-Ute in the amount of $500,000.00 is hereby discharged and released.

84 CV 7

I. HISTORY

This case, 84 CV 7, was consolidated with Case No. 83 CV 218, and was docketed in the Montrose District Court on January 12, 1984. Atlantic Richfield Co. (hereinafter referred to as ARCO), and Exxon Corporation (hereinafter referred to as Exxon) had filed a complaint seeking judicial review of the Commission's decision in Case No. 6076. A motion to dismiss the petitioners' complaint was filed by several of the intervenors and by Colorado-Ute, which motions were denied on January 4, 1984. Because of the similarity of parties, and because both of these cases revolved around Case No. 6076 before the Commission, venue in Case No. 84 CV 7 was transferred to the Montrose District Court and then consolidated with 83 CV 218. The history of 83 CV 218 and 84 CV 7 are therefore identical, and the only issue in 84 CV 7 relates to ARCO's and Exxon's disagreement with the Commission's decision to shift substantial demand costs into the energy portion of the demand-energy rate required by the Commission and that such shift was contrary to the staff's cost-of-service study, which is Exhibit 84 of the record.

II. GROUNDS FOR REVIEW

1. ARCO and Exxon argue that the Commission's decision to classify certain demand costs as energy costs is not supported by substantial evidence in the record.

In particular, the petitioners argue that the Commission's shift of certain demand related costs to the energy component of the seasonably adjusted energy-demand rate proposed by the staff and required by the Commission to be implemented as set forth in Appendix B of Decision No. C83-1176 is not supported by the evidence and the Commission's findings. According to the staff's cost-of-service study, approximately 56% of Colorado-Ute's costs are fixed capital costs, that is, expenses associated with the generation and transmission of electric power, and 44% of the costs are operational and maintenance expenses, primarily fuel costs. Assuming that the demand-energy rate proposed by the staff and adopted by the Commission is implemented, then that rate includes a demand charge to recover fixed capital costs and an energy charge to recover operational and maintenance expenses, the idea being that a separate energy charge and a separate demand charge most accurately tracks the actual cost of electrical service for any particular user.

In its decision, the Commission allocated $24,084,126.00 of the average demand revenue to the annualized energy charge, which, to a high energy user such as the petitioners, results in increased electrical costs.

Based upon the testimony and recommendations of Mr. Wendling, a staff witness, the Commission shifted part of Colorado-Ute's demand related costs to the energy component of their rate thereby assigning 32% of the cost to the demand charge and 68% to the energy charge, in contrast to the cost of service study which had determined that 56% of the costs were demand related and 44% energy related. The record is not clear on what basis this shift was made, and appears to be an attempt to devise a kind of "time-of-day" rate. The witness

acknowledged that such a rate could not properly be calculated without further data.

While exactitude and unerroring precision is not required, guesswork and personal preference is not allowed. The record is clear that there was no technical literature to support this classification and that the witness had conducted no research or studies which would support this misclassification. This is particularly true when one notes that such misclassification is contrary to the cost-of-service study resulting in a reduction of the demand related costs from 56% to 32% and an increase of the energy related costs from 44% to 68%. As noted on Page 14 of petitioners' brief, the existence of "some evidence and some particulars" is insufficient if the evidence as a whole does not support the Commission's decision. Lassner v. Civil Service Commission, 177 Colo. 257, 259, 493 P.2d 1087, 1089 (1972) (emphasis in original). This is particularly true since the only evidence apart from the conjecture and personal preference of Mr. Wendling is as it relates to the allocation of costs to the demand in energy components of the demand-energy rate, consists of the staff's cost-of-service study. Therefore, the Court finds that the Commission's decision in this regard should be set aside and the Commission be directed to adopt the cost-of-service study rates set forth in Exhibit 84.

2. The petitioners argue that the Commission's misclassification of demand costs as energy costs is arbitrary and capricious.

Any part of the Commission's order which appears to be a matter of personal preference or administrative convenience, and without the necessary investigation and research data, may be considered arbitrary and capricious and therefore invalid. City of Montrose v. Public Utilities Commission, 197 Colo.

119, 590 P.2d 502 (1979). The Court in that case held that there was no study done which would support the order of the Commission, however, in this case, there was a study done, the staff's cost-of-service study, however the basis for the misclassification, contrary to the study, was not founded upon any administrative or technical literature nor upon any research or studies to support the shift. As such, the Court must conclude that the decision of the Commission to reclassify the $24,084.126.00 [sic] of the demand costs to the energy costs was arbitrary and capricious and without sufficient study and foundation. Further, as noted on Page 22 of the petitioners' brief, the evidence indicates that such a study as proposed by Mr. Wendling was feasible, but like the City of Montrose case, supra. was not done.

3. The petitioners argue that the Commission failed to make adequate findings of fact to support its misclassification and shift of certain demand costs as energy costs.

The petitioners contend that the findings of the Commission must be sufficiently clear as to enable the reviewing court to engage in a meaningful review of the Commission's decision. A review of the record shows that the primary basis for this shift of demand costs inconsistent with the cost-of-service study was that Colorado-Ute utilized coal-fired power plants and therefore required a greater investment of capital than that generally needed for oil or gas plants, however, there was no finding nor evidence which suggested how the shift of the $24,084,126.00 corresponded to that premise.

Since one of the primary purposes of the public utilities law is to insure that the rates do not establish an unreasonable difference between classes of customers and that the rate payers be accorded equal treatment, it is clear that this shift of

demand costs to energy costs, contrary of the cost-of-service study, results in an unjust and discriminatory rate as it relates to the petitioners. The practical and end result of this shift, of course, is that the petitioners, and users like them, will pay considerably more for their electrical power and is therefore a preferential rate forbidden by law as set forth in C.R.S. 1973, 40-3-102 and 40-3-106. As pointed out on Pages 30 through 33 of the petitioners' brief, the Commission's proposed rate established a preference in that the winter customers pay rates below the actual cost of service to them (the record shows that Colorado-Ute is a winter peaking system) and that summer users pay higher rates than the actual cost-of-service and therefore in effect subsidizes the preferential rate for winter users. This preference is eliminated by requiring the Commission to adopt the rates based upon the staff's cost-of-service study.

Electric customers such as the petitioners, are constant and consistent users of electrical power, and are high-load consumers. That is, their use of electrical energy is fairly constant and is not significantly increased or decreased by summer or winter conditions. This means that the higher the load the lower the unit cost of electrical energy. Therefore, the misclassification of demand costs as energy costs significantly increase the costs of electrical power to such consumers. Since the rates should approximate the actual cost of service, the PUC rate is discriminatory in nature and in effect requires a high load consumer to subsidize a low load consumer. Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P.2d 495 (1979). While exact precision is not required as noted earlier, the enormity of this shift cannot be justified.

III. CONCLUSION

WHEREFORE, based upon the foregoing, the Court hereby sets aside that portion of the Commission's order in Decision No. C83-1176, Case No. 6076, which allocates $24,084,126.00 of the demand costs to the energy costs, and, if the Court's order in 83 CV 218 is set, hereby directs the Commission to adopt rates based upon the staff's cost-of-service study set forth in Exhibit 84 of the record. For the record and for clarification, 11 of the intervenors had filed a motion to dismiss in the Denver District Court in 84 CV 7, and the Court has not yet formerly [sic] denied Colorado Ute's [sic] motion to dismiss in that case. By this order, the Court hereby denies Colorado-Ute's motion to dismiss.

DONE IN OPEN COURT this 7th day of May, 1986.

/s/ Richard J. Brown
J U D G E

xc: All interested parties